FOR ARGUMENT

Supreme Court, U.S.
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No. 78-1693

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

GLEN M. CLARKE, MUNICIPALITY OF ANCHORAGE, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE MUNICIPALITY OF ANCHORAGE

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BRIEF FOR THE MUNICIPALITY OF ANCHORAGE

OPINIONS BELOW

The Municipality of Anchorage concurs with the treatment of this issue by the United States.

JURISDICTION

The Municipality of Anchorage concurs with the treatment of this issue by the United States.

QUESTIONS PRESENTED

Did the Court of Appeals for the Ninth Circuit err in holding that if laws of the state allow land to be taken for public purpose through inverse condemnation or a taking in the nature of inverse condemnation, as well as by formal, judicial, condemnation proceedings which precede the taking, 25 U.S.C. § 357 allows lands allotted in severalty to Indians to be condemned for public purpose through inverse condemnation or a taking in the nature of inverse condemnation, as well as by formal, judicial, condemnation proceedings?

Stated conversely, does 25 U.S.C. § 357 deprive Indians, whose lands have been allotted in severalty, of a constitutional cause of action to which all other American citizens are entitled whose property has been taken for public purpose for a state or its political subdivision with the power of eminent domain under the laws of the state, albeit without a formal, judicial eminent domain proceeding, for recovery of just compensation for a taking in inverse condemnation or in the nature of inverse condemnation?

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. § 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

All other relevant statutes are set forth in R: App. C-K; Brief for the United States, pages 2-4; Brief for Bertha May Tabbytite, pages 2-6 and its Appendix B.

STATEMENT

General

The United States attempts to categorize the controversy concerning the roadway across Mrs. Tabbytite's land as a feud between two homesteaders on a remote mountain top in frozen Alaska; the principal issue, seemingly, whether one homesteader, Clarke, could obtain the right to maintain a road to his homestead by continued trespass across the lands of his neighbor. This is misleading. The real issue before this court is whether a road which was heavily used as a public city street wholly within city boundaries between 1961 and 1975, indeed the main street of the city, and a publicly maintained municipal roadway since 1975 within the Municipality of Anchorage, a modern city encompassing half of the population of the State of Alaska, has been taken for public use through inverse condemnation or taking in the nature of inverse condemnation.

Facts

1. Glen Alps was incorporated as a third-class city by order of the Superior Court, Third Judicial District, Alaska, Case No. 61-60, on June 8, 1961. It encompassed all of Section 30, Township 12 North, Range 2 West (App. 35-37).

2. Immediately after incorporation, the City maintained and used the road crossing Section 30, including that portion crossing Tabbytite's property, as a public road; snow plowing it in the winter and grading it in the summer (TR: 69). The road crossing Tabbytite's property was fully within Section 30, the city boundaries (Plaintiff's Exhibit 8). (Plaintiff's Exhibits were filed on June 27 and 28, 1972.)

3. Between 1955 and 1966 Tabbytite was a homestead entrywoman without patent. On February 24, 1966 she relinquished her homestead rights (Plaintiff's Exhibit 5). On June 9, 1966 she was granted an Indian allotment (OR: 293; Plaintiff's Exhibit 7). Tabbytite's entry date, for purposes of the allotment was January 12, 1962 (Plaintiff's Exhibit 5).

4. The road across Mrs. Tabbytite's land was maintained and used as a public, city road between the time of the city's incorporation in 1961 until unification in September, 1975. It was the main street of the city (TR: 222-223, 230, 238).

In 1970, at the beginning of the current litigation, the City of Glen Alps attempted to acquire title to the road through emi-

nent domain. The first affirmative defense in the Answer for the City of Glen Alps, filed December 9, 1970 stated:

> Defendant City of Glen Alps alleges that it is a city of the third-class and possesses powers of condemnation under Alaska law. This defendant further alleges that any road across Mrs. Tabbytite's land is and has been a public road and that defendant has maintained such road. If the court should determine that said road cannot be properly maintained for the public, this defendant will request leave to amend this answer to file a counterclaim in condemnation.

After a trial on the merits, the District Court's order of November 19, 1973 (Pet. App. F) denied the Glen Alps counterclaim in condemnation as being "moot."

5. Prior to September 16, 1975, the City of Glen Alps was situated within the geographic boundaries of the Greater Anchorage Area Borough. Other cities existing within those boundaries were the City of Anchorage, a home rule city, and the City of Girdwood, a first-class city, organized under the laws of the State of Alaska. The Greater Anchorage Area Borough was a municipal corporation organized under the laws of the State of Alaska and constituted a form of regional government, roughly an analagous to a county.

On September 9, 1975 the voters approved a home rule charter which unified all existing governments into a single home rule entity and dissolved the former cities and the Greater Anchorage Area Borough. The election results were certified on September 16, 1975. Such action was taken pursuant to the Alaska Statutes. (R. App. I)

Pursuant to these provisions, as well as the Anchorage Municipal Charter which was enacted on September 16, 1975 (R. App. J), the unified government succeeded to all rights, titles, actions, suits, franchises, contracts and liabilities of the former cities and borough. The former cities, including the City of Glen Alps, became service areas within the Municipality for provision of services formerly provided within their boundaries (Motion Requesting Substitution of Municipality of Anchorage for City of Glen Alps as a Defendant, Memorandum

in Support of Motion to Substitute Municipality of Anchorage for Defendant City of Glen Alps, Affidavit of Richard A. Weinig, Entry of Appearance of Municipality of Anchorage, Affidavit of Phyllis Eileen Banks, Home Rule Charter for the Municipality of Anchorage, Anchorage Assembly minutes of September 16, 1975, filed with the Ninth Circuit Court of Appeals on March 15, 1976 in Case No. 74-1659).

6. Since unification on September 16, 1975, the road in question has been maintained and used as a public road of the Municipality of Anchorage (App. 38-39).

7. In September, 1975 when the Municipality began to use and maintain the street as a public road, it did so pursuant to a final judgment of the United States District Court for the District of Alaska that the road was a public throughfare, as an easement of necessity (Pet. App. F). During the five months between September, 1975 and February, 1976, when the Ninth Circuit Court of Appeals entered judgment reversing the judgment of the District Court, the Municipality had maintained the road through the rigors of an Alaskan winter pursuant to the District Court's judgment, which bound the Municipality since it was a legal successor in interest to all rights and obligations of the former City of Glen Alps (See Paragraph 5 above). The Ninth Circuit's opinion was issued on February 4, 1976 and its judgment was not entered until April 16, 1976 (R: 1-5). On March 15, 1976, before entry of judgment, the Municipality promptly moved to intervene as a home rule municipality with the powers of eminent domain and successor in interest to the former City of Glen Alps, which had maintained the road for the fourteen years prior to unification (See Paragraph 5, *supra*). Intervention of the Municipality in place of Glen Alps, was granted on April 5, 1976 (R: 12).

Shortly after the voluminous record on appeal was returned to Anchorage by the Ninth Circuit Court of Appeals, the Municipality moved for summary judgment, in the nature of declaratory judgment, to ascertain whether the road had been condemned through a taking in the nature of inverse condemnation, pursuant to the laws of Alaska and the provisions of 25 U.S.C. § 357 (R: 19-24; 26-30; 31-37; 48-63). It offered to

pay just compensation, be adjudicated by the United States District Court in this action, if the parties could not agree upon an appropriate amount (R: 30, 60). The parties stipulated to stay application for injunctive relief until the issue of whether a taking in the nature of inverse condemnation had been resolved by the District Court, with leave given to the Municipality to file a formal judicial eminent domain proceeding within thirty days after judgment if the Court determined that no taking in the nature of inverse condemnation had occurred (R: 39-40).

On November 9, 1976 the District Court ruled that no taking in the nature of inverse condemnation occurred prior to September, 1975 because the City of Glen Alps, as a third-class city, lacked the power of eminent domain. However, it invited the parties to re-brief the issue concerning whether a taking in the nature of inverse condemnation might have occurred after unification because the home rule, Municipality of Anchorage possessed the power of eminent domain (R: 111-114). The parties stipulated to stay injunctive proceedings pending resolution of this issue (R: 149-150).

On April 7, 1977 the District Court ruled that a taking in the nature of inverse condemnation had occurred as of the date of unification in September, 1975; that injunctive relief and trespass damages after this date were inappropriate (R. App. B).

The United States appealed to the Ninth Circuit Court of Appeals on June 6, 1977 (R: 174). In January, 1979, that Court affirmed the District Court's opinion. 590 F.2d 765 (9th Cir. 1979) (R. App. A).

8. The United States conceded in its Brief to the Ninth Circuit Court of Appeals (App: 41):

> There is no dispute but that federal law, Section 3 of the Indian Appropriation Act of 1901, 31 Stat. 1058, 1084, 25 U.S.C.A. § 357, authorizes the State of Alaska (or here its authorized political subdivision, the Municipality of Anchorage) to condemn that portion of the Tabbytite allotment necessary for the road.

9. The necessity for placement of the road in its present location, in a manner commensurate with the greatest public good and least private harm, had been litigated previously in this case, in Action No. 69-69, in a three-day trial upon the merits on June 27, 28 and 29, 1972.

In that trial there was uncontradicted testimony among witnesses qualified as experts in the construction and location of roadways, that the road was situated in the best practical location from both the standpoint of public and private interest due to the topography of the land.

Jack M. Spake, District Engineer for the Alaska Department of Highways, testified that in the course of his professional duties he had traveled the road thirty-five or forty times (App. 2, 3). He further testified that, in his professional opinion as the District Engineer for the Alaska Department of Highways, the present location of the road was the only practical place in which such a road could be situated (App. 8). He testified:

> I would say in my observation and analysis of the contures as shown on this map, the road is about as well placed, I believe, as you could actually put a road of this type (App. 8).

Rodney Spendlove testified that he had been a contractor actively engaged in the construction of roadways throughout Alaska for the nineteen years prior to trial (App. 15). Although he had no involvement in construction of the road, (App. 14) he testified that the present location of the road was the best practicable location in which such a road could be situated considering the topography of the land (App. 15, 18, 19). Neither the United States nor Mrs. Tabbytite introduced any expert testimony to contradict that of either Mr. Spake or Mr. Spendlove.

William Wakeland was a real estate appraiser who had been employed by the United States on behalf of the Bureau of Indian Affairs. He acknowledged that he had no engineering expertise concerning the location and construction of roadways (App. 32-33). However, he testified that the road, in its present

location, had *increased* the value of the land, rather than depreciated it (App. 28).

> Q What did you find the highest and best use of the property to be?
>
> A Potential subdivision, small tracts, in keeping with the restrictions imposed by the municipality.
>
> THE COURT: Would you repeat your answer?
>
> THE WITNESS: I found the best use to be the potential for future subdivision into small tracts (App. 29).

He offered no expert testimony that the road was not situated in a manner commensurate with the greatest public good and least private harm (App. 32-33). To the contrary, he offered the following testimony (App. 32-33):

> Q Well, you must have some background or knowledge to act as an appraiser, since you have also indicated the highest and best use would be a subdivision for small tracts; is that correct?
>
> A We work with them constantly.
>
> Q Do you know of any other route that you could recommend to the Court and counsel that road could take to better improve the Tabbytite property for a subdivision than that one which is now constructed?
>
> A Yes. I might point out that I pointed that out in my report [115]. It tends to be wasteful of a little of her property. The general alignment, I think, serves a subdivision. There are some minor problems. You will notice at the southeast corner of the property the road cuts back into it. There is no benefit to the subject property there. It should have either gone below a reasonable site or missed all together. That is wasting part of the property right there. And there is a couple other minor adjustments that might be made in that road to better serve a potential subdivision, but in general the alignment appears about what a person might have put in there if they were subdividing.

> Q Mr. Wakeland, assuming that you would construct another road to serve the area, as to better utilize the entire property, would that proposed road cost more than what the original road cost to get in there?
>
> A I don't know. I am not an engineer. We don't have a route surveyed. I don't know whether a right-of-way is practical or not. I did not examine that aspect.

Based upon this testimony, the District Court ruled that the road was situated in the only practical location in which a road could be situated upon that part of Anchorage; indeed that there were no practical alternatives to the present location of the road (Pet. App. F). The judge stated, in ruling upon this factual matter:

> The United States and Intervenor strongly urges that other access routes are available to the public, but the Court finds no convincing evidence whatsoever that this is true. In fact, the opposite is found to be true—that the route taken by Clarke at the time of road construction in 1958 was the only practical one available at reasonable cost for year-round access. In short, the Court finds the road to be a way of necessity (Pet. App. F).

While the Ninth Circuit Court of Appeals overruled the judge's *legal* termination that the road was "a way of necessity" (Pet. App. 11a-15a), the *factual* determination that the location of the road was the only practical one commensurate with the greatest public good and least private harm was not placed in the issue before the Ninth Circuit. This issue was not raised in the United States Points on Appeal and was not ruled upon by the Ninth Circuit. *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976) (Pet. App. E, 11a-15a). Therefore, this factual finding was res judicata upon both the United States and Tabbytite before the Municipality began maintenance of the road as a public throughfare after unification in September, 1975.

Issues of Law

Since Alaska law allows condemnation by formal eminent domain proceedings *or* a taking in inverse condemnation *or* a taking in the nature of inverse condemnation, as will be discussed below, does the taking by the Municipality of Anchorage for public purposes through inverse condemnation or in the nature of inverse condemnation satisfy the statutory authorization to condemn lands allotted in severalty to Indians contained in 25 U.S.C.A. § 357, particularly since the United States has conceded that the Municipality has the authority to condemn "that portion of the Tabbytite allotment necessary for the road," (App. 41) and since *factual* issue of reasonable placement of the road in its present location has been adjudicated previously in this action (App. 2-3, 8; 14, 15, 18, 19; 28, 32-33; Pet. App. 18a).

If such taking has occurred, the Municipality stipulates that Mrs. Tabbytite is entitled to just compensation, as well as trespass damages incurred prior to the taking in September, 1975, and that such issues may be adjudicated in this action upon the remand without the necessity of filing a separate action. The Municipality further suggests that the principal reason why each issue has not been resolved to date is the pendency of this appeal by the United States. Under Alaska law, the date of evaluation, if there has been a taking in inverse condemnation or in the nature of inverse condemnation, is the date of the original entry upon the land in question. *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-36 (Alaska 1975).

SUMMARY OF ARGUMENT

25 USC § 357 ALLOWS "CONDEMNATION" OF INDIAN ALLOTMENT LANDS BY TAKING IN THE NATURE OF INVERSE CONDEMNATION

1. Section 235 allows lands allotted in severalty to Indians to be "condemned" under the laws of the particular state or territory in the same manner as land owned in fee may be condemned. Therefore, what constitutes condemnation and the procedures for effecting it are a matter of state, rather than

federal law. In Alaska, it is well established that if land is taken for a public purpose by a government which possesses the power of eminent domain, albeit without prior institution of formal judicial condemnation proceedings, this constitutes a taking in the nature of inverse condemnation and, upon payment of just compensation, is a valid condemnation. *State Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966).

2. In September, 1975, Anchorage, a newly created home rule municipality, began maintaining the road across Tabbytite's land as a municipal roadway. As successor of the former City of Glen Alps, it began such activities while bound as prevailing party in a judgment by the United States District Court that the roadway was a public thoroughfare as a consequence of an easement of necessity. Anchorage maintained the road through an Alaskan winter until the District Court's opinion was reversed by the Ninth Circuit in February, 1976. Shortly thereafter, it entered an appearance in this action, in substitution for the former City of Glen Alps, and filed motions for summary judgment to determine whether the roadway was public, having been taken by inverse condemnation. Both the District Court and the Ninth Circuit Court of Appeals ruled that the taking in the nature of inverse condemnation had occurred.

3. Pursuant to this judgments, the Municipality has maintained the road until this time. It is willing to adjudicate just compensation in this action for a taking as of September, 1975, the date of taking.

4. If this court construes § 357 to deny Indian allottees a cause of action in the nature of inverse condemnation, Indians, as a class, would be harmed. They could well be forced to assume a disproportionate share of costs of public improvements or other governmental actions. Remedies of trespass and injunction may not always be adequate. Indian allottees would not be entitled to the remedies afforded in the overflight cases such as *United States v. Causby,* 328 U.S. 256 (1946), or the inundation cases such as *Hurly v. Kincaid,* 285 U.S. 95 (1932).

Moreover, such a construction would preclude Indians from a cause of action, the breath of which is demonstrated by *Albers v. California,* 398 P.2d 129 (Cal. 1975), in which the Supreme Court of California awarded $5,360,000 in inverse condemnation claims for damage to private property on the basis of strict liability. In *Albers*, there was no negligence, nuisance, foreseeability, or basis of recovery in tort. Since there was no physical invation to the property, an injunction would have afforded no relief. (*Albers* is discussed at 23-27 *infra.*).

UNITED STATES BRIEF

1. The United States argues that when § 357 was enacted in 1901, the word "condemned" referred exclusively to a judicial proceeding in eminent domain filed prior to entry upon the land and excluded "seizure" or what is now known as inverse condemnation. This ignores contemporaneous construction of contemporaneous acts. In 1902, the same Congress which enacted § 357 enacted § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 USC § 421. It allowed the Secretary of the Interior to acquire property "by condemnation under judicial process," a term more restrictive than the word "condemned" occurring in § 357. This Court in *United States v. Buffalo Pitts Co.,* 234 U.S. 228, 233 (1913), held that the language "condemnation under judicial process" allowed a taking by seizure. *See also, State v. Rank,* 493 F.2D 340, 345-355 (9th Cir. 1961) *aff'd Dugan v. Rank,* 372 U.S. 609, 619, 10 L.Ed.2d 15, 22-23 (1963). At least four other congressional acts, enacted between 1880 and 1916 which used the word "condemned," were construed by this Court. In each instance, the effect of the court's ruling was to allow condemnation, pursuant to the statute, by a taking without prior judicial proceedings and with the landowner relegated to a subsequent action for implied contract, in essence, inverse condemnation.

Four of the five state cases cited by the United States on page 12 of its brief to indicate that inverse condemnation did not exist in 1901 are, in their fact patterns, classic inverse condemnation cases.

2. If § 357 is construed to allow a taking in the nature of inverse condemnation, a state or municipality could never acquire title to the allotment without payment of just compensation. Title does not pass without payment of just compensation. *United States v. Lynah*, 188 U.S. 445 (1903). So if just compensation is not made, 28 USC § 2415(c) specifically allows the United States to recover possession of the property regardless of the time which may have lapsed after the original entry. Any action in the nature of inverse condemnation to recover just compensation must be in federal court with the United States as an indispensable party plaintiff as trustee. *Minnesota v. United States,* 305 U.S. 382 (1939).

TABBYTITE BRIEF

1. All Circuit Courts passing on the issue, as well as this court on at least one occasion, have held that 25 USC § 311 and § 325 are alternative remedies for acquisition of rights-of-way by state or its political subdivision. *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *United States v. Oklahoma Gas and Electric Company,* 127 F.2d 349, 354-55 (1942), *aff'd* 318 U.S. 206, 214 (1943); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977, *cert. den.* 435 U.S. 1006 (1978).

2. The act of February 5, 1948, 25 USC §§ 323-328 did not repeal § 357 by implication. The 1948 act dealt with Secretarial grants of right-of-way, a consentual transaction in nature. Section 357 deals only with condemnation, the power of eminent domain. The very definition of eminent domain includes a taking without consent of the owner. 1 *Nichols on Eminent Domain* § 1.11 (3rd Rev. Ed. 1976). The two acts deal with totally different subject matter. Moreover, the legislative history of the 1948 act indicates that insofar as it considered condemnation at all, the bill "broadens existing powers of condemnation over individually owned Indian lands." *U.S. Code and Congressional News*, 1036 (1948). Its further intention was not to expand the right of Indian allottees to refuse to consent to Secretarial grants of right-of-way; it was to broaden the

Secretary of the Interior's power to grant such right-of-ways regardless of the Indians' consent, a measure advocated by the Secretary in the interest of departmental efficiency. (*Id.*)

3. If 25 USC §§ 323-328 supercede any rights granted to states or their political subdivisions by § 357 to condemn allotment lands, either by rule of statutory construction of by implied repeal, and this Court construes these statutes to preclude any condemnation of allotment lands without prior compliance the procedures set forth in § 324, no condemnation of land held by a single allottee would be possible. Section 323 does not allow the Secretary to approve a right-of-way grant across an allotment held entirely by a single Indian without that allottee's consent. Construction of condemnation statute to require consent of the condemnee before the land can be taken through the power of eminent domain is, at best a contradiction in terms; at worst, an absurdity. Under such a construction, any state or municipal project for the public good which required crossing an individually owned allotment by use of the power of eminent domain could be stopped permanently by one recalcitrant Indian.

4. Tabbytite has been an active party and participant in this action since 1972 and has been represented by counsel. She has received full due process from the Municipality of Anchorage.

ARGUMENT

A TAKING OF INVERSE CONDEMNATION OR IN THE NATURE OF INVERSE CONDEMNATION OCCURRED ON SEPTEMBER 16, 1975 AND SATISFIES THE CONDEMNATION REQUIREMENTS OF 25 U.S.C. § 357

Since the Municipality of Anchorage has the power of eminent domain granted by state law, (App. 41), its use and maintenance of the road in question as a public roadway since September 16, 1975 has constituted an appropriation of Tabbytite's property beneath the road for public purpose, albeit without benefit of formal eminent domain proceedings. Under Alaska law, this constitutes a taking in the nature of inverse condemnation. *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963); *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966); *City of Anchorage v. Nesbett,* 530 P.2d 1324 (Alaska 1975); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976); *See United States v. Causby,* 90 L.Ed. 1206 (1946); *Hurley v. Kincaid,* 285 U.S. 95, 104-105, 637, 643 (1932); *United States v. Cress,* 243 U.S. 316, 61 L.Ed. 746, 753-54 (1917). The issue of just compensation must still be adjudicated in this action upon remand. The Municipality offers its fullest cooperation toward resolution of this issue.

Lands allotted to Indians in severalty may be condemned by a municipality vested with powers of eminent domain by state law. 25 U.S.C.A. § 357. Section 357 states in full:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned and the money awarded as damages shall be paid to the allottee.

This is a power available to a body empowered to exercise eminent domain under state law, which is an alternative to securing a permit from the Secretary of the Interior pursuant to 25 U.S.C.A. § 311. *United States v. Minnesota,* 113 F.2d 770, 773 (9th Cir. 1940); *Nicodemus v. Washington Power Company,*

264 F.2d 614 (9th Cir. 1959); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977) *cert. denied,* 435 U.S. 1006 (1978). State law governs whether the condemning agency is empowered to exercise this power and the manner of the proceeding so long as the issue of just compensation is adjudicated in federal, rather than state, court. *United States v. Minnesota, supra; Nicodemus v. Washington Power Company, supra; United States v. Oklahoma Gas & Electric Co.,* 127 F.2d 349, 354-55, *aff'd,* 87 L.Ed. 716 (10th Cir. 1942); *City of Okemah, Okl., v. United States,* 140 F.2d 963, 966 (10th Cir. 1944).

Alaska state law allows exercise of the power of eminent domain through inverse condemnation or a taking in the nature of inverse condemnation. *State Department of Highways v. Crosby,* 410 P.2d 724, 728-39 (Alaska 1966); *See City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-35 (Alaska 1975); *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976).

In *Crosby, supra,* as in *Myers, supra,* the fact situation was strikingly similar to that in the present case. In each case, a public body with powers of eminent domain constructed or maintained a road across private land in a mistaken belief that it was entitled to do so. In *Myers* and *Crosby,* the mistake concerned section line rights-of-way. In the present case, the mistake concerned a belief that an easement of necessity existed across Mrs. Tabbytite's land, a belief with which the District court concurred until reversal by the Ninth Circuit Court of Appeals in April, 1976. In *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963) the United States, through the Bureau of Public Roads, constructed a road in Alaska on the belief that it was situated upon a section line right-of-way. The property owners sued for injunction and trespass. The court held:

> It is clear to us that the claims of the appellants asserted against the United States are to recover damages for the taking for public use of property claimed to be owned by the appellants, without the institution of condemnation

> proceedings. The repeated characterization by the appellants of the taking by the United States as one of trespass and the commission of waste upon the lands in question does not convert the claims to cases sounding in tort and thereby confer jurisdiction on the District Court under the Federal Tort Claims Act. The Fifth Amendment to the Constitution prohibits the taking of private property for public use without just compensation. To us the claim of appellants against the United States are founded upon the Constitution, and the acts of the United States complained of are in the nature of inverse condemnation. Since the claims of each appellant against the United States exceed $10,000.00, the Court of Claims has exclusive jurisdiction to hear or determine the claims against the United States. See *United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), and *United States v. Gerlach Livestock Co.,* 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

While the Fifth Amendment is only applicable to the Federal government, the Fourteenth Amendment would make such a holding applicable to the Municipality of Anchorage in this case. *Griggs v. Allegheny County,* 369 U.S. 84 7 L.Ed. 585 (1962). The Alaska Supreme Court adopted the holding in *Myers,* 323 F.2d 580, 582-83 (9th Cir. 1963), and in *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966).

For these reasons, the Municipality believes that operation and maintenance of the road across Mrs. Tabbytite's property as a public road by the Municipality since unification in September, 1975 constitutes a taking in the nature of inverse condemnation and that such taking is allowed by 25 U.S.C.A. § 357 so long as just compensation is paid to the allottee and the issue of just compensation is adjudicated in federal, rather than state, courts.

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in

> fee may be condemned and the money awarded as damages shall be paid to the allottee.

This is a power available to a body empowered to exercise eminent domain under state law, which is an alternative to securing a permit from the Secretary of the Interior pursuant to 25 U.S.C.A. § 311. *United States v. Minnesota,* 113 F.2d 770, 773 (9th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977) *cert. denied,* 435 U.S. 1006 (1978). State law governs whether the condemning agency is empowered to exercise this power and the manner of the proceeding so long as the issue of just compensation is adjudicated in federal, rather than state, court. *United States v. Minnesota, supra; Nicodemus v. Washington Power Company, supra; United States v. Oklahoma Gas & Electric Co.,* 127 F.2d 349, 354-55, *aff'd,* 87 L.Ed. 716 (10th Cir. 1942); *City of Okemah, Okl., v. United States,* 140 F.2d 963, 966 (10th Cir. 1944).

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the belief that it was situated upon a section line right-of-way. The property owners sued for injunction and trespass. The court held:

> It is clear to us that the claims of the appellants asserted against the United States are to recover damages for the taking for public use of property claimed to be owned by the appellants, without the institution of condemnation proceedings. The repeated characterization by the appellants of the taking by the United States as one of trespass and the commission of waste upon the lands in question does not convert the claims to cases sounding in tort and thereby confer jurisdiction on the District Court under the Federal Tort Claims Act. The Fifth Amendment to the Constitution prohibits the taking of private property for public use without just compensation. To us the claim of appellants against the United States are founded upon the Constitution, and the acts of the United States complained of are in the nature of inverse condemnation. Since the claims of each appellant against the United States exceed $10,000.00, the Court of Claims has exclusive jurisdiction to hear or determine the claims against the United States. See *United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), and *United States v. Gerlach Livestock Co.,* 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

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For these reasons, the Municipality believes that operation and maintenance of the road across Mrs. Tabbytite's property as a public road by the Municipality since unification in September, 1975 constitutes a taking in the nature of inverse condemnation and that such taking is allowed by 25 U.S.C.A.

§ 357 so long as just compensation is paid to the allottee and the issue of just compensation is adjudicated in federal, rather than state, courts.

IF A TAKING IN THE NATURE OF INVERSE CONDEMNATION HAS OCCURRED, INJUNCTIVE RELIEF IS INAPPROPRIATE

If there has been a taking through inverse condemnation or in the nature of inverse condemnation, issuance of an injunction is inappropriate since the property owner has an adequate remedy at law: recovery of just compensation. *Hurley v. Kincaid,* 285 U.S. 95, 76 L.Ed. 637, 643 (1932); *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966); *See Loma Portal Civic Club v. American Airlines, Inc.,* 394 P.2d 548, 552 (Cal. 1964); *Garden Water Corp. v. Fambrough,* 531 Cal.Rptr. 862 (Cal. App. 1966); *Los Angeles Brick and Clay Products Co. v. City of Los Angeles,* 141 P.2d 46, 53 (Cal. App. 1943).

Probably the leading case discussing the propriety of an injunction when land has been taken for a public purpose without use of formal condemnation proceedings is *Hurley v. Kincaid, supra.* There, land was taken by the United States through flooding. The Supreme Court held:

> We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized. [citations omitted] If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. [citations omitted] The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire

> now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's land, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and afford no basis for an injunction if such compensation may be procured in an action at law. The 5th Amendment does not entitle him to be paid in advance of the taking. [citations omitted]

The Alaska Supreme Court has also held that an injunction is improper under these circumstances. The Court stated in *State Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966):

> This statement might be construed as meaning that the state must first institute condemnation proceedings in accordance with statute and rule before it may enter upon and utilize the property that it has already appropriated. We believe that such a requirement is unrealistic. The property has already been taken. *It would serve no useful purpose to insist now that the state must initiate a condemnation action and take the initial steps required by law and rule as a condition to the exercise of its power of eminent domain. What is at issue here is the matter of awarding appellees just compensation. Such compensation may be determined in this proceeding, utilizing so far as practicable the statutory requirements and procedural steps relating to the condemnation action, as well as it could be determined in a separate condemnation action to be instituted by the state.* Since the evident purpose of the injunction was to require the state, if it chose to utilize appellees' property, to institute a separate condemnation action to acquire such property, and *since we have held that such action is unnecessary, the injunction was not appropriate and should be dissolved.* [emphasis added.]

Both *Hurley, supra,* and *Crosby, supra,* should be controlling in this case concerning injunctive relief. An injunction is not appropriate if there has been a taking in the nature of inverse condemnation. Moreover, issuance of an injunction would im-

pose a grave hardship upon innocent persons who live in Glen Alps who must use the road to go to work, return to their homes and receive medical assistance or fire protection. A proportionate hardship is not imposed upon Mrs. Tabbytite; if there has been a taking in the nature of inverse condemnation, she has an adequate remedy at law: award of just compensation, which can be adjudicated in this action upon remand.

IF THERE HAS BEEN A TAKING IN THE NATURE OF INVERSE CONDEMNATION, TRESPASS DAMAGES FOR USE OF THE ROAD AFTER SUCH TAKING ARE INAPPROPRIATE

Clearly, if a taking in the nature of inverse condemnation has taken place, trespass damages, if any, should not be assessed against persons using the road after the date of taking. The Ninth Circuit Court of Appeals had held that trespass damages do not lie after there has been a taking in the nature of inverse condemnation. *Myers v. United States,* 323 F.2d 580, 582-83 (9th Cir. 1963).

While the Fifth Amendment is only applicable to the federal government, the Fourteenth Amendment would make such a holding applicable to the City of Glen Alps and the Municipality of Anchorage in this case. *Griggs v. Allegheny County,* 369 U.S. 84, 7 L.Ed. 585 (1962).

Under the doctrine of *Erie Railroad v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938), state law controls a tort such as trespass and damages therefore. The Alaska Supreme Court, in *State Department of Highways v. Crosby,* 410 P.2d 724, 728-29 (Alaska 1966), has adopted the holdings in *Myers,* 323 F.2d 580, 582-83 (9th Cir. 1963), that trespass damages will not lie when there has been a taking in the nature of inverse condemnation. It has ruled similarly in *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976).

Myers, 323 F.2d 580, 582-83 (9th Cir. 1963), *Crosby,* 410 P.2d 724, 728-29 (Alaska 1966), and *Wickwire,* 557 P.2d 783 (Alaska 1976) are controlling in this case concerning the inappropriateness of trespass damages after there has been a taking

in the nature of inverse condemnation. This would not affect the right of the United States and Mrs. Tabbytite to seek trespass damages against individual defendants prior to the date of taking.

CONSTRUING 25 U.S.C.A. § 357 TO PRECLUDE A CAUSE OF ACTION IN THE NATURE OF INVERSE CONDEMNATION TO INDIAN ALLOTTEES IN SEVERALTY WOULD HARM INDIANS AS A CLASS.

The United States and Tabbytite argue, repeatedly, that statutes should be construed in every reasonable way to favor the Indian. However, they also present the curious, shocking argument that the entire class of Indians who have been allotted lands in severalty should be denied a constitutional cause of action in the nature of inverse condemnation which is afforded to all other American citizens. The Ninth Circuit recognized this danger to Indians, as a class, when it observed:

> To us it seems a contradiction to deny Indians and beneficial owners a cause of action for damages under the guise of protecting their rights.

United States v. Clarke, 590 F.2d 765, 767 (1979) (R. App. A).

United States and Tabbytite, for reasons of their own choosing, argue that the remedies of trespass and injunction are adequate and that a cause of action in inverse condemnation or in the nature of inverse condemnation should be denied to the entire class of Indian allottees. If the intrusion upon the allotment lands is not of such magnitude as to constitute a taking under the laws of the state in question, the Ninth Circuit recognized that its holding "does not prevent the United States and the allottee from seeking immediate relief from unlawful intrusions upon land, whether the intrusion is done by trespass by a public or private entity." *United States v. Clark, supra.*

Trespass and injunction, however, may be inadequate remedies. If the plaintiff in *United States v. Causby,* 328 U.S. 256 (1946), whose land was subject to over flight, had been an Indian allottee rather than a non-Indian chicken farmer he

would be denied the relief afforded in that case if a cause of action in the nature of inverse condemnation were not available. The same result would obtain, if the United States and Tabbytite theories prevail, in *Griggs v. Allegheny County,* 369 U.S. 84 (1962). If the plaintiff whose land was inundated or about to be inundated in *United States v. Cress,* 243 U.S. 316 (1917) or *Hurley v. Kincaid,* 285 U.S. 95 (1932) were an Indian allottee and the arguments of the United States and Tabbytite were to prevail, he would be denied just compensation through a cause of action in the nature of inverse condemnation although his lands have been taken, in fact, by the rising waters.

25 U.S.C. § 357 provides that both state substantive and procedural law control concerning allotment land which is "condemned." Therefore, the breath of the cause of action in the nature of condemnation will vary according to the laws of each state. An illustration of the almost boundless scope of the inverse cause of action which the United States and Tabbytite seek to deny to Indian allottees can be illustrated by *Albers v. County of Los Angeles,* 390 P.2d 129 (Cal. 1965).

Article 1, Section 14 of the California Constitution provides:

> Private property shall not be taken or damaged for public use without just compensation.

This provision is identical to Article 1, Section 18 of the Alaska Constitution and is similar to the "taking or damage" provisions of twenty-four other state constitutions. 2 *Nichols on Eminent Domain,* § 644 (Revised 3rd Add. 1976).

Albers v. County of Los Angeles, supra involves the Portagese Bend area of the Palos Verdes Hills, a southerly coastline and peninsula overlooking the Pacific Ocean on the western side of Los Angeles. In the 1950's the County of Los Angeles extended Crenshaw Boulevard west to the Pacific Coast Highway. Part of the road crossed a known prehistoric slide area which all engineering studies indicated had been at rest for several thousand years. The trial judge specifically "found an absence of negligence or contributory negligence on the part of any party, and . . . also found that the evidence

did not include the necessary elements of a nuisance . . . ." *Id.* at 132.

When the highway was constructed, there was no physical invasion of the property of the plaintiffs by the county. The road was constructed in as professionally responsible a manner as such a road could be constructed. Unfortunately, after the road was built, houses and lands several hundred yards down hill from the road began to slide toward the ocean. This consequence was not foreseeable. However, plaintiffs were awarded $5,360,000.00 in damages as a consequence of a claim in inverse condemnation.

In affirming the award and judgment, the Supreme Court of California recognized a total absence of negligence, nuisance, forseeability or any other ground upon which recovery in tort could be predicated, but affirmed the award on the basis of inverse condemnation. It ruled:

> For these reasons we conclude that in the appeal of the county the judgments should be affirmed on the ground that with the exceptions stated in *Grey, supra,* and *Archer, supra,* any actual, physical injury to real property proximately caused by the improvement as deliberately designed and constructed as compensable under Article 1, Section 14, of our Constitution whether foreseeable or not. *Id.* at 147.

In short, the court allowed recovery in inverse condemnation for $5,360,000 on the basis of strict liability because a public improvement had been made and private property had been proximately damaged as a consequence of that project. There are two exceptions to this doctrine of strict liability:

1. If the damage "involved noncompensable damages 'inflicted in the proper exercise of the police power'."

2. If it were "encompassed in those cases in which the state at common law 'had the *right* to inflict the damage' (such as person defending his property against rampant flood water)." *Holtz v. Superior Court of City and County of San Francisco,* 475 P.2d 441, 446 (Cal. 1970).

In *Albers, supra,* the property owners whose land and homes had been damaged as a consequence of a public project would have been precluded from recovery through trespass, nuisance, negligence or any other action in tort. Since there was no physical entry upon their lands by the government agency, an injunction would have been of little help. Only through a cause in inverse condemnation were they able to secure just compensation for damage to their property proximately caused by a public project. (Whether the same would have obtained under a purely "taking" constitution is uncertain. Possible, the same result would have obtained. In California, physical invasion is not a prerequisite to compensation. *Varjabedian v. City of Madera,* 527 P.2d 43, 50 (Cal. 1977). Yet the United States and Tabbytite would deny the entire class of Indian allottees this cause of action under the guise of protecting their rights.

Daniel R. Mandelker, "Inverse Condemnation: The Constitutional Limits of Public Responsibility," 1966 *Wisconsin Law Review* 3 thoroughly discusses another aspect and advantage of allowing an inverse condemnation cause of action. A cause of action in inverse condemnation or in the nature of inverse condemnation allows a cause of action for taking or damage occurring *after* a formal, judicial condemnation has occurred. The implications of this can be illustrated by *Grant v. State of Alaska*, 560 P.2d 36 (Alaska 1977). There, land was denied access to Gastineau Canal, an arm of the Pacific Ocean by a highway project. The taking was effected through an inverse condemnation action, although the results in this case would have been the same if it had been through a formal, judicial condemnation action. After the original taking occurred and settlement was made on the basis that limited access would be allowed to the Pacific through culverts placed under the highway, the culverts collapsed. The State Highway Department decided that it would be too expensive to replace the culverts, so it eliminated them. The highway was rebuilt without the culverts in place and the land was completely landlocked from the Pacific. After the initial settlement, but before this development, the party who consented the original

settlement with the Highway Department sold to another party who relied upon the culverts as part of the purchase price. Upon learning that the culverts would no longer be installed as a consequence of subsequent highway design change, he brought an action in inverse condemnation and was allowed recovery. If under the same circumstances, an Indian allottee had been the land owner throughout the proceedings and after settlement of the original case, in a formal, judicial proceeding, the highway design were changed and if no inverse cause of action were to lie, the allottee would be without remedy.

25 U.S.C. § 357 should be construed to favor the Indian allottee by affirming his right to a cause of action in the nature of inverse condemnation if the laws of the state in question so allow.

RESPONSE TO BRIEF OF THE UNITED STATES

THE WORD "CONDEMNED," AS USED IN 25 U.S.C. § 357, IS NOT LIMITED TO A FORMAL, JUDICIAL PROCEEDING IN EMINENT DOMAIN WHICH IS FILED BY THE STATE OR POLITICAL SUBDIVISION PRIOR TO ENTRY UPON THE LAND.

When 25 U.S.C. § 357 was enacted in 1901, the words "condemned" or "condemnation" did not refer exclusively to a judicial proceeding in eminent domain filed prior to entry upon land which is to be acquired through exercise of power of eminent domain. Three methods of "condemnation" were prevalent among the States and Federal Government in 1901:

1. Formal, judicial eminent domain proceeding, 6 Nichols on Eminent Domain § 24.113; 26.1-26.732 (Rev. 3rd Ed. 1976).

2. Administrative proceedings whereby the condemning agency customarily filed a map indicated the area taken with the applicable recording district, leaving the property owner with the burden of bringing an action for just compensation before the appropriate administrative or judicial tribunal; 1 Nichols on Eminent Domain § 1.22 [11], [12]; 4.101; 6 Nichols § 25.1-25.7 (Rev. 3rd Ed. 1976).

3. What the United States has called "seizure" and what has become known as the taking in the nature of inverse condemnation. Indeed, this is one of the oldest forms of condemnation. Its essence, then couched as an implied contract to pay just compensation, rather than by the direct words "inverse condemnation," was recognized by this Court at least as early as 1872 in *Pumpelly v. G.B.M. Canal Company,* 80 U.S. 166, 20 L.Ed. 557 (1872). In 1864, the United States government took private property for public purpose without the prior institution of eminent domain proceedings, with the Supreme Court relying upon an implied promise to pay just compensation. *United States v. Great Falls Manufacturing Company,* 112 U.S. 645, 656-657, 28 L.Ed. 846, 850 (1884).

The origins of state power to exercise eminent domain power is set forth in 1 Nichols on Eminent Domain § 1.23(1) (Rev. 3rd Ed. 1976):

> When the people of the American colonies became independent of Great Britain, each colony became a sovereign state, and by the mere fact of sovereignty assumed absolute control over the property within its jurisdiction.
>
> In *Munn. v. Illinios,* 94 U.S. 113, 124, 24 L.Ed. 77, the Supreme Court said:
>
> "When the people of the United Colonies separated from Great Britain, they changed the form but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament and through their state constitutions or other forms of social compact undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property."
>
> To each state thus passed all the powers of king and Parliament, *Dartmouth College v. Woodward,* 4 Wheat U.S. 518, 4 L.Ed. 629; *Cherokee Nation v. Georgia,* 5 Pet. U.S. 1, 8 L.Ed. 25; *Munn v. Illinois, supra,* to be exercised as the people of the state saw fit. Upon the assumption of such sovereign powers each state was vested with the general power of eminent domain. *Dalche v. Board of Commissioners,* 49 F(2) 374.

The power of eminent domain, as an instance of sovereignty to states admitted to the Union after the thirteen original states was reserved through the Tenth Amendment of the Constitution and the "Equal Footing" Doctrine. It was recognized by this Court in *Cincinnati v. Louisville and N.R. Company,* 223 U.S. 390, 56 L.Ed. 481 (1912). Given this diversity of eminent domain proceedings among the states in 1901, it is not surprising that Congress in enacting § 357 elected to allow the laws of each state to control the substance and procedure of "condemnation" of Indian allotment lands in severalty.

Origins of the powers of the federal government with respect to eminent domain powers are discussed in 1 Nichols on Eminent Domain § 1.24 [1]-[5] (Rev. 3rd Ed. 1976).

The key word in 25 U.S.C.A. § 357 is "condemned." The United States correctly argues, that this word, occurring in a statute enacted on March 3, 1901, should be construed if possible in accordance with contemporary usage. While the legislative history of the particular statute is of little help, there is a wealth of statutory language enacted in the twenty-year periods both preceding and following the act of March 3, 1901 utilizing the word "condemn" or, even more specifically, "condemnation under judicial process."

In 1882, Congress enacted a statute entitled "An Act to Increase the Water Supply of the City of Washington and for Other Purposes". The text of the statute is set forth at length in *Great Falls Manufacturing Company v. Garland,* 124 U.S. 581, 584-588, 31 L.Ed. 527, 528-529 (1888) and (R: App C). After authorizing the Secretary of War and the Attorney General of the United States to acquire such property as might be necessary for construction of a dam on the Potomac River in the vicinity of the Great Falls, it provided in relevant part:

> And provided further: That if it shall be necessary to resort to condemnation, the proceeding shall be as follows: . . .

Provision was then made for preparation of a map and survey describing the project, notification of any potential claimants, appointment of appraisers to report upon evaluation of the property and made provision for filing of a petition to the Court of Claims of the United States of any person who declined to receive the value set by the appraisers. It further set forth terms for right of entry upon the premises and vesting of title:

> Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon payment being made therefore, or, without payment upon the expiration

> of the times above limited, without the filing of a petition, absolute title to the premises shall vest in the United States. (U.S. at 587, L.Ed. at 529).

After the unhappy property owners filed their petition with the Court of Claims, contested constitutionality of the statute this Court ruled that, although there had been no judicial proceeding prior to the United States entry upon the land, the act of taking, coupled with the provision allowing for subsequent action by the property owners to secure just compensation constituted condemnation of the land. The Court stated.

> The present inquiry in respect to land or water rights taken from the plaintiff must therefore be conducted with reference to their value—not in 1863 when the government declined to take them, but in 1883 *at the time of their being condemned for public use under the act of 1882.* (U.S. at 595, L.Ed. at 532). [Emphasis added.]

Therefore, the 1882 statute must be construed to hold that congressional intent was that if the land were taken for public purpose and the property owner was paid just compensation in a subsequent action filed by him, the land was "condemned."

On September 27, 1890 (26 Stat. 492) Congress authorized establishment of a public park in the District of Columbia. This Court in *Shoemaker v. United States*, 147 U.S. 282, 284-285, 37 L.Ed. 170, 177 (1893) found that:

> The act provides that the whole tract be selected and *condemned*, shall not exceed two thousand acres and that the cost thereof shall not be in excess of a certain amount appropriated.

Relevant portions of the statute provided:

> Sec. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park showing the location, quality, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said

map the several tracts and parcels of land embraced in said Rock Creek Park *shall be held as condemned* for public uses, and the title thereof vested in the United States subject to payment of just compensation, to be determined by said commission, and approved by the President of the United States: Provided, that such compensation be accepted by the owner or owners of the several parcels of land. [Emphasis added.] . . . .

Sec. 4. That said court may direct the time and manner in which the possession of the property *condemned* shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession. [Emphasis added.] (The entire text quoted is found in R: App D).

The act left determination of just compensation to the President, not a judicial tribunal. (U.S. at 288, L.Ed. at 178). This court held that such proceeding constituted condemnation.

The most persuasive evidence of contemporary usage concerning the intention of Congress in using the word "condemned" which is used in 25 U.S.C. § 357, Act of March 3, 1901, was an act, passed by the same Congress, authorizing condemnation in Section 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 USC § 421. (R: App. E) The Ninth Circuit Court of Appeals discussed this section at length in *State v. Rank,* 293 F.2d 340, 354-355 (1961), and was affirmed in this holding by this Court in *Dugan v. Rank,* 372 U.S. 609, 619, 10 L.Ed. 15, 23 (1963):

This contention is based upon language contained in § 7 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 421:

"That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States *by purchase or by condemnation under judicial process*, and to pay from the

reclamation fund the sums which may be needed for that purpose***." [Emphasis supplied.]

The Supreme Court, however, has recognized this section as authorizing a taking by physical seizure. In United States v. Buffalo Pitts Company, 1913, 234 U.S. 228, 233, 34 S.Ct. 840, 842, 58 L.Ed. 1290, it was stated:

"Furthermore, the government was authorized by § 7*** under which this improvement was being made, to acquire any property necessary for the purpose, and, if need be, to appropriate it."

Furthermore, in legislation specifically dealing with the Central Valley Project, Congress has used different and less restrictive language. The project was authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, and the First Deficiency Appropriation Act, 1936, 49 Stat. 1622. By the Rivers and Harbors Act of 1937, 50 Stat. 850, the project was expressly reauthorized. There it is provided that the Secretary *"may acquire by proceedings in eminent domain, or otherwise,* all lands, rights-of-way, water rights, and other property necessary for said purposes***." [Emphasis supplied.]

In our view, it cannot be said that Congress intended with respect to the Central Valley Project that exercise of the power of eminent domain was to be exclusively through judicial proceedings and that physical seizure and inverse condemnation were not to be available.

In affirming the Ninth Circuit's holding concerning the impact of Section 7 of the Reclamation Act of 1902, this Court stated:

The Court of Appeals correctly held that the United States was empowered to acquire the water rights of respondents by physical seizure. *Dugan v. Rank,* 372 U.S. 609, 619, 10 L.Ed. 15.23 (1963).

This holding is particularly significant in determining congressional intent of utilizing the word "condemned" in 25 U.S.C.

§ 357. Not only is the phrase "by condemnation under judicial process" far more restrictive concerning procedure than the mere word "condemned" which occurs in § 357. The Supreme Court decision in *United States vs. Buffalo Pitts Company,* 234 U.S. 228, 233, 58 L.Ed. 1290 (1913) was highly contemporaneous with the times in which § 357 was adopted, and allowed the far more restrictive language of "condemnation under judicial process" to authorize acquisition of property by physical seizure, or as it is now known, a taking in the nature of inverse condemnation.

It should be further noted that the language "by purchase or by condemnation under judicial process" is identical to the language used in the General Federal Condemnation Act of August 1, 1888, 40 U.S.C. § 257. (R. App. F) This was the first general act authorizing federal condemnation, nationwide. 1 Nichols on Eminent Domain, § 1.24[5] note 51 (Rev. 3rd Ed. 1976).

In *Campbell v. United States,* 266 U.S. 368, 370-371, 69 L.Ed. 328, 330 (1924) this Court examined a statute in which the President and Secretary of War were authorized to "purchase or condemn the lands." The land in question had been seized for purposes of construction of a nitrate plant during World War I. The words "purchase or condemn the lands," was sufficient to sustain this court's finding that "the taking was under the sovereign power of eminent domain," thereby relegating the former property owner to bringing a separate action to enforce the implied promise of the United States to compensate him for his loss. Impliedly, the words "purchase or condemn" were sufficient to justify exercise of the eminent domain power, condemnation, by physical seizure.

This abundance of contemporary statutory usage in which the words "condemned" and "condemn under judicial proceeding" have been construed to allow a taking through "physical seizure," as the United States uses the term or a taking in the nature of inverse condemnation, as it is commonly known today, is abundant evidence that when Congress enacted 25 U.S.C. § 357 it intended that the eminent domain laws of the state in which the property was situated should con-

trol. If state law allowed exercise of eminent domain powers only through formal, prior, judicial proceedings state law would control. The same would obtain for a state which allowed exercise of condemnation through administrative proceedings, as well as a state law which allowed exercise of condemnation powers through either formal, judicial proceedings or a proceeding in the nature of inverse condemnation. "Condemnation" and "eminent domain" are clearly synonymous terms, for a sovereign power, of which "inverse condemnation" is but a subspecie.

The contemporaneous statutes enacted, and construed above are far more reliable indices of congressional intention in 1901 than the United States' attempts to construe the word "condemned," as it was written in 1901 by its interpretation of the Uniform Relocation Assistance in Real Property Policies Act of 1970, 42 U.S.C. § 4601 et seg., an act which has passed some sixty-nine years after the statute in question. Not only is the action of a congress acting sixty-nine years after the fact a questionable guide to legislative interpretation; the 1970 Act was intended to affect a fundamental change in the direction and refinement of the Condemnee's substantive and procedural rights. 1 *Nichols on Eminent Domain* § 1.14[5]; (Rev. 3rd Ed. 1976); 6 *Nichols on Eminent Domain* 34.1-34.3[26].

The cases cited on pages 11 and 12 of the United States Brief provide no authority for the assertion that when Congress utilized the word "condemned" in 25 U.S.C. § 357, this term excluded a taking through physical seizure with a subsequent action to be brought by the allottee to recover just compensation under an implied contract or, what is now known as inverse condemnation.

Winslow v. Baltimore and Ohio Railroad Company, 188 U.S. 646, 47 L.Ed. 635 (1903) offers no assistance. There, an action was brought by the railroad against a private individual to establish the validity of a lease and compel specific performance to sell. The land was situated in the District of Columbia, with the action being brought in the District of Columbia.

Exercise of eminent domain powers, apparently, was not plead. Summary of Briefs, 47 L. Ed. 634, 638 (1903).

While the Supreme Court did not allow adjudication of just compensation in the same action, ruling that "the proceeding to condemn is otherwise provided by law . . ." it gave no reasons for this holding nor did it allude to the provisions of law which were applicable.

United States v. Lee, 106 U.S. 196, 27 L.Ed. 171 (1882) is no authority for asserting that land may not be "condemned" through an action in the nature of inverse condemnation. There, the United States entered upon land now used for Arlington Cemetery without lawful authority. It made no attempt to offer just compensation or adjudicate just compensation, either in the pending action or by separate proceeding. In allowing ejectment of the United States, the court ruled that the United States had not exercised its powers of eminent domain because, although it occupied the property, it refused to allow exercise of the eminent domain powers through failure to offer just compensation or allow adjudication in this or other proceedings. In effect, the court said to the United States "Pay or get out. Choose."

On page 12 of its brief, the United States cites five contemporaneous state cases alleging that "the states limited condemnation to judicial proceedings . . ." (Pet. Brief: 11). Curiously, four of the five cases cited are classic inverse condemnation cases.

In *Fries v. Wheeling and Lake Erie Railroad Company,* 46 N.E. 516 (Ohio 1897), a railroad company entered upon land with verbal consent of the owner and verbally promised to pay for the land. After it built its track, it refused to pay. The Supreme Court of Ohio ruled that the land owner's remedies were governed by a specific Ohio statute which gave the property owner three possible remedies: 1) ejectment 2) the right to compel an appropriation; or 3) a suit to recover compensation. Ejectment was denied because the property owner consented to entry and was, thus, estopped.

The right to compel compensation, was in essence, a action for breach of contract as a consequence of failure of consideration.

The right to compel an appropriation was, simply, a cause of action to compel appropriation through payment of just compensation—a cause of action that is now known as inverse condemnation. The only difference between suing to recover compensation or to compel an appropriation was the measure of recovery. If the property owner sued to compel an appropriation, he could recover severance damages, as well as compensation for the part taken. If he sued for compensation, he would receive compensation for only the part taken, with no damages to the remainder. In short, the case was limited to a specific Ohio statute and authorized a cause of action in what is now known as inverse condemnation.

Stewart v. Milwaukee Electric Railroad and Lighting Company, 86 N.W. 163 (Wis. 1901) was an appeal "by defendant (the railroad company) from an order appointing commissioners in *condemnation proceedings* and denying defendant's motion to dismiss" (164). [Emphasis added.]

An injunction was not allowed. A 1897 statute gave either party the right to file a condemnation proceeding.

Here, the property owner brought the *"condemnation proceedings"* after the railroad had entered upon the land without either payment or prior filing of an eminent domain proceeding. [Emphasis added.]

Stewart, supra, is a classic case in inverse condemnation.

Charnley v. Shavano Water-Power and River-Improvement Company, 85 N.W. 507 (Wis. 1901) was a suit by a property owner to appoint commissioners for the purpose of determining just compensation resulting from inundation of his lands by a company which possessed the power of eminent domain. There was no holding requiring the company to file a separate action in eminent domain. This, also, was the classic fact pattern in inverse condemnation.

Parrish v. Yorkville, 79 S.E. 635 (S.C. 1913) resulted from the town of Yorkville dumping sewage into a stream which crossed Parrish's land, thereby polluting it.

The South Carolina statutes provided the appropriate procedure to "condemn." The municipal corporation would appoint an arbitrator to determine just compensation. The property owner would appoint a second arbitrator and these would appoint a third. This board would determine just compensation. If either appealed to court, the issue would be resolved by trial by jury.

The court held that the property owner, as well as the municipal corporation, could compel appointment of the arbitrators to determine just compensation after the land had already been taken for public purpose. "We conclude, therefore, that plaintiff has a remedy by condemnation under the statute." (636). It, therefore, was unnecessary to determine whether a tort action was barred by sovereign immunity. Again, "condemnation" as used above, is synonymous with a taking in the nature of inverse condemnation.

Russell v. Chicago and Milwaukee Electric Railway Company, 68 N.E. 727 (Ill. 1903) offers little guidance. A railway was placed in a "street" which had not been properly dedicated by plat and which, actually belonged to the plaintiff. The court ruled that a mandatory injunction should be issued ordering the railroad to remove the facilities unless it were to "institute condemnation proceeding . . ." The court did not specify the nature of the "condemnation proceedings" nor the date of valuation.

United States v. Lynah, 188 U.S. 445, 467, 478-469, 47 L.Ed. 539, 147-548 (1903) offers no support for the assertion that takings in the nature of inverse condemnation "were deemed truly exceptional at the turn of the century" and a sharp distinction was made between such "takings" on the one hand and "condemnation" on the other (Pet. Brief 12).

The principal statute which authorized the United States to undertake the public improvement, which ultimately, inundated the plaintiff's land without prior institution of formal

judicial eminent domain proceedings, 25 Stat. at L. 194, Chap. 194, 1888 provided:

> An act to facilitate the prosecution of works projected for the improvement of rivers and harbors.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the *acquirement by condemnation* of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; *such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted:* Provided, however, That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: And provided further, That the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works. [Emphasis added.] [R. App. G]

The statute allowed the Secretary of War to acquire land for the project "by condemnation" with "such proceedings to be prosecuted in accordance with the laws of the States" relating to the condemnation of property. Yet, this Court in *United States v. Lynah, supra,* allowed plaintiff's land to be taken for public purpose through seizure if just compensation was paid in a subsequent action under "implied contract" pursuant to the authority of this statute which allowed "condemnation." The decision in *United States v. Lynah, supra,* is contemporaneous with usage concerning the word "condemnation" at the time Congress enacted 25 U.S.C.A. § 357 in 1901 and allows "condemnation" through what is, in essence, an action in the nature of inverse condemnation (U.S. at 474, L.Ed. at 550).

As the United States has indicated (Pet. Brief 13-14) passage of title if there is a taking in the nature of inverse condemnation is contingent upon payment of just compensation. As this Court indicated in *United States v. Lee,* 106 U.S. 196, 27 L.Ed. 171 (1882), the condemning agency must choose: exercise of its eminent domain powers through payment of just compensation either before or after the date of physical taking, or get out. In Alaska, the date of valuation is the date of entry upon the property. *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-1336 (1975). In this respect it is identical to the date of valuation of the United States. *United States v. Dow,* 357 U.S. 17 (1958).

On pages 15-16 of its brief, the United States cites a 1967 opinion of the Alaska Attorney General to the effect that a taking in the nature of inverse condemnation is not favored in the State of Alaska. It should be noted, that opinions of the Attorney General in the State of Alaska have little legal effect and are not recognized as persuasive authority by the courts of this state. Second, that a taking in the nature of inverse condemnation is a valid condemnation upon paying just compensation has been recognized by the Alaska Supreme Court since 1966 without exception. *Alaska Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966); *City of Anchorage v. Nesbett,* 530 P.2d 1324, 1334-36 (Alaska 1975); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976); *Grant v. State,* 560 P.2d 36 (Alaska 1977).

It should be noted that the Municipality began maintenance of the road upon unification in September, 1976 in good faith, then being bound by a final judgment of the United States District Court for the District of Alaska that the road was a public thoroughfare, as an easement of necessity (See Statement, Facts, Par. 7). Since 1976 the Municipality has been willing to adjudicate just compensation in this action (*Id.* Par. 9).

CONSTRUING THE WORD "CONDEMNED" IN 25 U.S.C. § 357 WOULD NOT LEAD TO "ILLOGICAL RESULTS."

On pages 16-19 of its brief, the United States alleges that reading 25 U.S.C. § 357 to authorize takings by inverse condemnation would lead to illogical results. Three grounds are asserted for this proposition:

1. Allowing a taking in the nature of inverse condemnation would contravene the doctrine of *Minnesota v. United States,* 305 U.S. 382 (1939) by allowing a situation in which "a state subdivision was permitted to acquire allottee land without resort to *any* court" (Pet. Brief at 17).

2. Allowing a taking in the nature of inverse condemnation "would permit states, under certain circumstances, to acquire allotted lands without paying of any compensation . . ." because, allegedly, an action to procure just compensation could be barred by a statute of limitations, thereby allowing acquisition of title to lands without any compensation.

3. Allowing "condemnation" of allotment lands through a taking in the nature of inverse condemnation would impose a burden upon Indian allottees because of the Eleventh Amendment.

The assertion that a state or municipality could acquire title to allotment land without payment of just compensation or "without resort to *any* court . . ." is without merit. As this court has ruled repeatedly, e.g., *United States v. Lee*, 106 U.S. 196, 27 L.Ed. 171 (1882); *United States v. Lynah*, 188 U.S. 445, 47 L.Ed. 539 (1903), title to land taken through "seizure" or through a taking in the nature of inverse condemnation does not pass to the condemning agency until payment of just compensation. The condemning agency must choose: exercise of its eminent domain powers through payment of just compensation or face ejectment. *United States v. Lee, supra.* As the Ninth Circuit has recognized in this case, 590 F.2d 765, 767 (1979), (R. App. A), any action to recover just compensation for taking in the nature of inverse condemnation must be brought in federal court pursuant to *Minnesota v. United*

States, 305 U.S. 382 (1939) since the United States is an indispensable party. This axiomatic jurisdictional prerequisite has nothing to do with the form of the proceedings: formal, judicial eminent domain proceedings before entry upon the land, as opposed to proceedings to determine just compensation in case of the taking in the nature of inverse condemnation.

Congress in enacting 25 U.S.C. § 357 merely consented to condemnation of Indian lands in severalty "in the same manner as land owned in fee may be condemned . . ." under applicable state law. Neither that statute nor any other federal statute or rule of civil procedure, specifies the procedure which must be followed in condemning such land other than the fundamental jurisdictional requirement that the adjudicative stages of the proceeding must be in federal courts since the United States is an indispensible defendant or, in the case of the taking in the nature inverse condemnation, an indispensible plaintiff. While the judicial proceedings must be in federal court, the authority for manner of and procedure employed in the taking are governed by state—not federal law. In this respect, by using the language "may be condemned in the same manner as lands owned in fee may be condemned . . ." § 357 is both a substantive and procedural statute.

Under no circumstance, however, could a state or municipality acquire title to allotment lands through a taking in the nature of inverse condemnation, without payment of just compensation as determined by adjudication in the federal court, to which the United States was a party. Nor is there merit in the argument that "a taking by seizure offers the property owner no opportunity to challenge the authority for the taking or the extent of its necessity" (Pet. Brief 13). The Alaska Supreme Court in *State Department of Highways v. Crosby,* 410 P.2d 724, 729 (Alaska 1966) has held that such issues can be adjudicated in an inverse condemnation action. Indeed, the course of the present litigation indicates that these issues may be adjudicated without filing a separate eminent domain proceeding (Statement, Facts Par. 4, 8, 9). The United States has conceded that the Municipality has the necessary authority to condemn that portion of the Tabbytite allotment

necessary for the road (App: 41). The undisputed testimony at trial by all expert witnesses, Jack M. Spake, Rodney Spendlove and William Wakeland, is that the road is situated in the most practical location in which such a road could be situated. (Statement, Facts Par. 9)

That these factual issues have been adjudicated in this action already, (Statement, Facts Par. 8 and 9) belies this United States argument, as well as that of Tabbytite (Brief Pgs. 32-37).

Construing 25 U.S.C.A. § 357 to allow a taking in the nature of inverse condemnation would not deprive the allottee of just compensation through running of a statute of limitation, as is argued on page 17 of the United States Brief. Footnote 9 states:

> It is not clear whether under Section 357 state statutes of limitation govern or the federal statute (28 U.S.C. 2415) is applicable. That issue, however, is not involved here.

It is difficult to see how this program could arise. The United States as trustee has a moral and legal obligation to protect the interests of Indian allottees. *Minnesota v. United States,* 305 U.S. 382 (1939). *See* also *Board of County Commissioners v. Seber,* 318 U.S. 705, 715 (1943) (Pet. Brief, 23). In its capacity as trustee, with such moral and legal obligation, the United States would be an indispensable party plaintiff in any action to recover just compensation for a taking in the nature of inverse condemnation. Moreover, a state or municipality could never acquire title to Indian allotment lands without paying just compensation. If it refused to exercise its eminent domain powers through failure to pay just compensation, it should suffer ejectment. *United States v. Lee,* 106 U.S. 196 (1882); *United States v. Lynah,* 188 U.S. 445 (1903). 28 U.S.C. 2415(C) provides:

> Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, all right of possession of, real or personal property.

Since allotment lands are held in fee simple by the United States subject to the trust period for the Indian allottee, the statute of limitation cannot run for ejectment during the trust period if the state or municipality refuses to pay just compensation. It must choose: pay just compensation, valued at the date upon which the allottee was deprived of beneficial use of the property in question, or leave. If such just compensation is not made, 28 U.S.C. § 2415(C) specifically allows the United States to recover possession of the property regardless of the time which may have lapsed after the original entry.

The United States, on pages 18-19 of its brief, raises an interesting statute of limitations problem concerning a situation in which:

> a governmental taking is "piggy-backed" unto a trespass, either by a private person or by a entity lacking authority to effect a taking, an action for trespass can be asserted as a counterclaim in a condemnation proceeding no matter when the trespass occurred (25 U.S.C. § 2415(F). However, if takings by seizure are permitted, the burden of bringing a proceeding is on the United States and the Indian allottee, and any trespass claim must be asserted affirmatively. In such circumstances, the claim presumably would be subject to the sixth and one-quarter year statute of limitations set forth in 28 U.S.C. § 2415(B).

This may be true. Doubtless Congress, when it enacted that statute of limitations in 1966, was aware of the problem and was willing to entrust this duty of diligence to the United States in discharge of its fiduciary duties as trustee for the allottee. The duty imposed upon either the United States or the Indian is no greater than that which any other property owner must bear in being observant about trespass and seeking timely remedy—except that the statute of limitations for recovery of the land cannot run against the United States.

Under any circumstance, it is difficult to see how a procedural limitation of remedy, such as statute of limitation, enacted by a Congress sixty-five years after the fact has the slightest bearing upon interpretation of whether Congress in

1901 in enacting the word "condemned" in 25 U.S.C. § 357, intended to allow a taking in the nature of inverse condemnation where the laws of the state in question allowed this.

Finally, it is argued that permitting takings in the nature of inverse condemnation would impose a burden upon both the United States and allottees as a consequence of the Eleventh Amendment. (It is conceded on page 19 of the United States Brief that this problem does not occur if the condemnor is a municipality, as it is in this case, rather than a state). It is improbable that this consideration would have persuaded Congress in enacting 25 U.S.C. § 357 in 1901 to preclude a taking in the nature of inverse condemnation by its use of the word "condemned." The Dawes Allotment Act, Act of February 8, 1887, 24 Stat., 388, 389, § 4 (R. App. K) contemplated *settlement* upon the land by the allottees on land outside reservations, thereby making it improbable that allottees would be considered citizens of a different state. Under any circumstance, the burden upon the United States in discharge of its fiduciary duties as trustee for the allottee would be the same regardless whether the action were in formal, judicial eminent domain proceedings or through a taking in the nature of inverse condemnation.

Regardless of the nature of the proceeding, it must be brought in federal court and the United States must be an indispensable party, whether plaintiff or defendant. *Minnesota v. United States,* 305 U.S. 382 (1939). As the United States has conceded, on page 23 of its brief:

> The United States as trustee has a moral and legal obligation to protect the interests of Indian allottees.

Minnesota v. United States, supra, See also *Board of County Commissioners v. Seber,* 318 U.S. 705, 715 (1943).

As trustee it must discharge the same fiduciary duty, with the same preparation and diligence, regardless of whether its ward can bring suit. Hence, it is difficult to see how the Eleventh Amendment could place a higher fiduciary duty upon a trustee than that which Congress has already bestowed.

THE ALLEGED BURDENS WHICH WOULD BE IMPOSED BY ALLOWING 25 U.S.C. § 357 TO AUTHORIZE TAKINGS IN THE NATURE OF INVERSE CONDEMNATION, ARE PREDICATED UPON MATTERS NOT OF RECORD.

In setting forth its chain of "burdens" on pages 20-22 of the brief, the United States places extensive reliance upon matters not of record; matters which have never been introduced as any form of evidence in this case. Representative are the following assertions:

1. Indians do not reside on or make use of allotted lands.

2. Allotments are often quite remote.

3. Signs of encroachment are not always obvious. Boundaries are undertain.

4. Indians must overcome cultural barriers which inhibit their ability to comprehend Anglo-American concepts of property and vagaries of our legal system.

5. Unavailability of counsel.

6. Assertion that states or their political subdivisions condemn land "in remote areas."

7. The implication that land values are customarily rising.

8. The assertion that "Mrs. Tabbytite's award would be "prior to the current pipeline-induced land boom."

9. The United States holds an estimated 12 million acres of allotted land in trust. (Petition for Certiorari p. 9, n. 5.)

Argument which is not based upon evidence in the record, should be disregarded. Particularly objectionable are assertions, without evidence, concerning location of Indian allotments and assertions that the allottees have no immediate means to determine whether there has been an intrusion upon the land or not. Equally objectionable are the assertions which assume that land values always rise. Contrary arguments are set forth in *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1334-36 (Alaska 1975); *State v. Stumbo*, 352 P.2d 478 (Ore.

1960); and *Georgia-Pacific Corporation v. United States*, 568 F.2d 1316 (Ct. Cl. 1978). An Indian allottee during the trust period could not lose her land by what amounts to adverse possession. During the trust period, the United States holds fee title to the allotment as trustee. 24 U.S.C. § 2415(C) removes any barrier which might be imposed by a statute of limitation for recovery of the property. Title could not pass to a condemning agency, through the process of a taking in the nature of inverse condemnation, without payment of just compensation. *United States v. Lee*, 106 U.S. 196 (1882); *United States v. Lynah*, 188 U.S. 445 (1903).

RESPONSE TO BRIEF OF BERTHA MAY TABBYTITE

HIGHWAY RIGHTS-OF-WAY ACROSS ALOTTED INDIAN LANDS ARE SUBJECT TO CONDEMNATION.

25 U.S.C. § 311 is not the exclusive grant of authority for acquisition of the highway right-of-way across Indian allotment lands.

Tabbytite argues that 25 U.S.C. § 311 is the exclusive provision allowing acquisition of rights-of-way across Indian allotment lands, to the exclusion of § 357. In support of its argument it asserts that it governs, as a more specific statute, although both sections were enacted as consecutive parts of the same bill, on the same day, by the same Congress. Paragraph 25 U.S.C. § 311 provides:

> The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to an individual Indian under any laws or treaties, but which have not been conveyed to the allottee with full power of alienation.

25 U.S.C. § 357 reads:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

It is argued that because § 311 allows the Secretary to grant permission for "the opening and establishment of public highways, . . ." whereas § 357 allows allotment lands to be "condemned for any public purpose under the laws of the State or Territory where located . . .", the former should control over the latter as being more specific and dealing with identical subject matter (Tabbytite Brief: 9-14).

The two statutes do not deal with identical, or even similar subject matter. Section 311 authorizes the Secretary of the Interior to "grant permission" to state and local authorities across allotment lands under such requirements as he may deem necessary. This connotes a consensual grant, a negotiated purchase by the state or territory, as it were, from the Secretary. Section 357 authorizes "condemnation." The difference between a negotiated purchase and condemnation is that between apples and oranges.

A negotiated purchase is consensual in nature on behalf of each party. If permission is to be granted under § 311, it must be by permission of the Secretary, under such terms and conditions as he may choose. Condemnation, exercise of the power of eminent domain, is far different. It is defined in 1 *Nichols on Eminent Domain* § 1.11 (Rev. Third Ed. 1976) as follows:

> Eminent domain is the power of the sovereign to take property for public use without the owners consent. This definition expresses the meaning of the power in its irreducable terms:
>
> (a) Power to take,
>
> (b) Without the owners consent,
>
> (c) For the public use.

Nichols further explains the power of condemnation, of eminent domain:

> It is an inherent power, necessary to the very existence of the government. It comes into being *eo instante* with the establishment of the government and continues as long as the government endures. It does not require recognition by constitutional provision but exists in absolute and unlimited form. Under this view, positive assertion of limitations upon the power is required. This requirement is met by the provisions found in most of the state constitutions relating to the taking of power by eminent do-

> main. Such constitutional provisions neither directly nor impliedly grant the power to eminent domain, but are simply limitations upon a power already in existence which would otherwise be unlimited. (*Id.* § 114 [2]).

Morton v. Mancari, 417 U.S. 535, 550, 41 L.Ed. 2d 290, 300 (1974) recognized that the rule that a more specific statute governs over a more general is not applicable when the statutes deal with entirely different subjects. In this respect, the difference between § 311 and § 357 is not unlike the preferential Indian employment provisions in the Bureau of Indian Affairs set forth by the Indian Reorganization Act of 1934 and its apparent conflict with the Equal Employment Opportunity Act of 1972. In distinguishing the two and rejecting the "more specific statute" argument, this Court observed:

> The anti-discrimination provisions aimed at alleviating minority discrimination in employment, is obviously designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is more apparent than real. (U.S. at 550, L.Ed. 2d at 300).

The same is true of 25 U.S.C. § 311 and § 357.

Without exception, the circuit courts have and, upon at least one occasion this Court, has recognized that § 311 and § 357 are *alternative* remedies for acquisition of rights-of-way by a state or its political subdivision. *United States v. Minnesota,* 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *City of Okemah, Oklahoma v. United States,* 140 F.2d 963, 966 (10th Cir. 1944); *United States v. Oklahoma Gas and Electric Company,* 127 F.2d 349, 354-55 (1942), *aff'd* 318 U.S. 206, 214 (1943); *Transok Pipeline Company v. Darks,* 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied* 435 U.S. 1006 (1978).

Indeed, if § 311 were construed to exclude the right of states or their political subdivisions to condemn allotment lands for highway purposes, if the laws of the state so allowed, yet another canon of statutory interpretation would be violated. An important public purpose authorized by §357 could no longer be achieved through the power of eminent domain,

rather than negotiated purchase. *United States v. Campos-Serrano,* 404 U.S. 293, 301, n. 14, 30 L.Ed. 2d 457, 464 (1971) holds that:

> [A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.

Conversely, construing § 357 to allow condemnation of highway rights-of-way, as well as all other public purposes, would not deprive the right of the Secretary to grant permission under terms of his choosing for highways where the state or political subdivision desired a negotiated, administrative purchase and did not wish to enter into the judicial thicket of eminent domain. Construing the statutes as alternative remedies, as this Court and all circuits which have adjudicated the issue have done, gives effect to both § 311 and § 357. As this court observed in *Morton v. Mancari,* 417 U.S. 535, 551, 41 L.Ed. 2d 290, 301 (1974):

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

As all parties have observed, there is no significant legislative history which illustrates congressional intention governing enactment of either § 311 or § 357.

PRIOR ADMINISTRATIVE PRACTICE AND CONSTRUCTION ARE NOT OF MUCH ASSISTANCE.

The Municipality concurs with Tabbytite that prior administrative practice and construction are not of much assistance.

UNITED STATES V. OKLAHOMA GAS AND ELECTRIC COMPANY, 127 F.2d 349, 354-355 (1942) aff'd 318 U.S. 206, 214 (1943) DOES NOT SUPPORT THE INAPPLICABILITY OF § 357 TO THE ACQUISITION OF HIGHWAY RIGHTS-OF-WAY.

Tabbytite's analysis that *United States v. Oklahoma Gas and Electric Company,* 318 U.S. 206 (1943) precludes use of § 357 to acquire highway rights-of-way is baffling. Not only did this Court affirm a judgment by the Tenth Circuit, 127 F.2d 349, 354-355 (1942) which expressly acknowledged that § 357 and § 311 were alternative remedies to acquisition of highways across allotment lands; it further recognized that exercise of § 357 was not contingent upon permission of the Secretary of the Interior. It acknowledged that the power of condemnation of allotment lands pursuant to § 357 was an independent grant of powers to the states to condemn Indian allotment land which was an alternative to other right-of-way statutes, including § 311. 318 U.S. 206, 214 (1943). The compatibility of § 311 and § 357 as alternative remedies has been affirmed by every court to pass upon the issue. *United States v. Minnesota,* 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *City of Okemah, Oklahoma v. United States,* 140 F.2d 963, 966 (10th Cir. 1944); *Transok Pipeline v. Darks,* 565 F.2d 1150 (10th Cir. 1977) *cert. denied* 435 U.S. 1006 (1978).

THE ACT OF FEBRUARY 5, 1948 DOES NOT PRECLUDE CONDEMNATION THROUGH § 357.

General

The Municipality concurs with Tabbytite's assertion, occurring on pages 20-24 of her brief, that if the act of February 5, 1948, 25 U.S.C. § 323-328 were intended to repeal § 357, by either statutory interpretation or implied repeal, lack of one Indian allottee's consent would preclude acquisition of any part of allotment lands for any public purpose if the allotment were in single ownership. 25 U.S.C. § 324 allows a grant of

right-of-way across the lands of individual Indians without consent of the individual owners only if:

1. the land is owned by more than one person, and the owner or owners of the majority of the interest therein consent to the grant;

2. the whereabouts of the owner of the land or interest therein are unknown, and the owner or owners of any interest therein whose whereabouts are known, or a majority thereof consent to the grant;

3. the heirs or devisees of a deceased owner of the land or an interest therein have not been determined and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or

4. the owners of interests in the land are so numerous that the Secretary finds that it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Clearly, if allotment lands are in the hands of a single owner, the Secretary would be powerless to grant a right-of-way without that owner's permission. The entire purpose of condemnation of a portion of allotment lands pursuant to the laws of the state would be thwarted because, by definition, exercise of the power of eminent domain is without the consent of the owner. 1 *Nichols on Eminent Domain* § 1.11 (3rd Rev. Ed. 1976). The fundamental question is whether Congress intended such an extreme abrogation of the states' necessary powers of eminent domain. If so, any project of a state or municipality which must utilize individual allotment lands could be thwarted by one recalcitrant Indian if the land were in single ownership.

Canons of statutory interpretation do not compel such a result.

The secretarial grant provisions of §§ 323-328 are in the nature of negotiated purchase of right-of-way, a consensual transaction. The "condemnation" provisions of § 357, by

definition, allow exercise of the sovereign of eminent domain contrary to the wishes of all owners in property.

Tabbytite notes that §§ 311 and 323-328 specifically apply only to rights-of-way while § 357 authorizes condemnation generally for any public purpose. Brief for Tabbytite goes on to argue that the Court can give effect to both §§ 323 et seq. and § 357 with regard to the acquisition of interest in allotted lands other than rights-of-way. (Tabbytite at 22.) The Court should observe, however, that the specificity of §§ 311-322 and §§ 323-328 relate to the power of Secretary of the Interior to *grant* rights-of-way according to various rules and conditions. Neither the cases cited nor the rules of statutory construction diminish the efficacy of § 357 as a separate means of acquiring rights-of-way across allotted lands by one other than the Secretary. The court can therefore give effect to both §§ 323-328 and § 357 by giving effect to the plain meaning of §§ 323-328 granting certain powers to the Secretary that are in no way limiting, inconsistent with, or repugnant to the provisions of § 357 allowing condemnation by means other than the exercise of powers by the Secretary.

Nor does the rule of statutory construction known as *expressio unis exclusio alterius* apply. The 1948 amendments dealt purely with secretarial grants of right-of-way. The condemnation provisions of § 357 dealt with an entirely different subject matter. These are alternative, compatible ways of acquiring rights-of-way across allotment lands.

Although the expressio unis maxim has been applied as a part of legal reasoning, there is nothing particularly legal about it; it is a product of logic and common sense expressing the idea that generally when a statute says one thing it does not mean something else. 2A Sutherland, *Statutes and Statutory Construction* § 47.24, at 127 (4th ed. 1973). The maxim has been applied in many cases defining the limits of the doctrine of implied repeal. In one such case the Colorado Supreme Court stated that the maxim:

> The maxim may never be resorted to in denial of existing rights by envoking its aid in the interpretation of a statute granting others which are not inconsistent. . . .

People ex rel Park Reservoir Co. v. Hinderlider, 57 P.2d 894, 897 (Colo. 1936). The maxim is only a rule of statutory construction, not a rule of substantive law, that must be applied with great caution and only under certain conditions where it is appropriate. 2A Sutherland, *Statutes and Statutory Construction* § 47.25, at 132 (4th ed. 1973).

Because § 357 was enacted in 1901 and §§ 323-238 were enacted in 1948, a period of some 47 years, Judge Magruder's statement in *Rios v. United States* is particularly appropriate:

> As bearing on the intention of Congress it is worthwhile to note: (1) that the maxim expressio unis est exclusio alterius is nothing but an aid to interpretation, and as an aid it is pretty weak when applied to acts of Congress enacted at widely separated times.

Rios v. United States, 256 F.2d 68, 71 (1st Cir. 1958).

Neither logic nor even legal reasoning require the conclusion that a mere grant of powers to the Secretary of Interior pursuant to §§ 323-28 is inconsistent with, repugnant to, or irreconcilable with a prior statute allowing the acquisition of right of ways over allotted lands.

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The Act of February 5, 1948
Did Not Repeal § 357 by Implication.

This court, in *Morton v. Mancari,* 417 U.S. 535, 550, 551 (1974) set forth the standard by which an allegation of repeal by implication must be judged:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. . . . (Citations omitted). . . .
>
> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts on the same subject, the rule is to give effect to both

> if possible. . . . The intention of the legislature to repeal "must be clear and manifest."

Nothing in the legislative history of the Act of February 5, 1948 suggests an intention to preclude, or even restrict, existing powers of condemnation of Indian allotment lands contained in § 357.

Legislative history of the Act of February 5, 1948, 25 U.S.C.A. §§ 323-328, 62 Stat. 17, is found in *United States Code and Congressional Service,* 1033-1037 (1948). R. App. H It began its life as Senate Bill 1095, introduced on April 11, 1947 which was intended "To Facilitate Rights-of-way Through Restricted Osage Indian Land and for Other Purposes" (*Id.* 1034). A companion bill, H.R. 3322 was introduced on July 7, 1947. It read:

> That the Secretary of the Interior is hereby authorized to grant rights-of-way in the nature of easements, under such rules and regulations as he may prescribe, for the construction, operation and maintenance of pipelines of every kind and character, pumping plants, canals, ditches, flumes, highways, telephone and telegraph lines, and electric power transmission lines, over, under, upon, through, and across any lands, the title to which is inalienable without approval of the Secretary of the Interior, owned or acquired or by or for any member of the Osage tribe who does not have a certificate of competency.

Volume 93, Congressional Record, 8354.

A substitute bill, recommended by the Secretary of the Interior, was enacted in place of the former language of H.R. 3322. *United States Code and Congressional Service,* 1033-1034 (1948). The most comprehensive statement of legislative purpose adopted by the Senate Committee on Public Lands, through Senate Report No. 823 was a letter from the Secretary of Interior to the President of the Senate, dated July 22, 1947 (*Id.* at 1036). As the Secretary explained, the purpose of expanding the scope of the act from only Osage lands to all Indian lands, owned individually or tribally, was to simplify the procedural impendments which had hindered the

Secretary from granting rights-of-way across Indian lands. Its principal intention was *not* to add additional layers of protection to Indian rights. It was to save the United States time and money by streamlining Secretarial grant procedures.

Procurring the consent of Indians with individual interests in an allotment posed a particularly onerous administrative duty upon the Secretary. He explained:

> When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior. Very often as many as 15 to 20 individual Indians own undivided interests in 1 parcel of land and the signatures of all owners must be obtained. As a general rule these owners are widely scattered and frequently one or more of them are deceased and their heirs have not been determined. Thus, years may elapse before all of the owners' signatures can be obtained. As a practical matter, the burden of obtaining signatures to easement deeds falls on this department and becomes a time- and money-consuming operation. In a great many cases the value and amount of land required for a right-of-way is very little and the cost to the United States in time and money is very high.

In the interest of departmental economy, the Secretary proposed the present text of 25 U.S.C. §§ 323-328, the Act of 1948. Instead of expanding the right of any Indians with an interest in an allotment oppose a Secretarial grant, the Secretary would make this decision for him—of course within the limits set forth Section 2 of the proposed bill, now 25 U.S.C. § 324.

Considering the language of the July 22, 1947 letter, which Senate Report 823 suggests, is persuasive authority of the intent of the bill, it is questionable whether the "consent" provisions of the Act of 1948 were intended to expand any rights of

Indians to object to Secretarial right-of-way grants across their allotments. Rather, it suggests that the purpose behind the Act was to *restrict* their right of objection in the interest of departmental economy.

There is nothing in the letter to indicate restriction of the powers of the Secretary. Nor was there the slightest evidence that Congress, in enacting the act of February 5, 1948 intended to repeal, or even curtail the condemnation powers bestowed by § 357. The only reference to "condemnation" in the letter of July 22, 1947 is the last paragraph:

> Section 5 of the Bill *broadens* existing powers of condemnation over individually owned Indian lands. [Emphasis added.]

Tabbytite argues, on page 24 note 14 of the brief, that "Interior may have used the term 'condemnation' loosely to refer to procedures authorizing administrative conveyance of rights-of-way across Indian lands." 25 U.S.C. § 327, Section 5 of the Act, does apparently broaden Secretarial powers to grant rights-of-way to federal agencies. However, it is equally probable that when the Secretary used the word "condemnation," he meant just what he said: "condemnation," not "negotiated purchase" or "Secretarial grant." The terms are different by definition. In any instance, there is no legislative history which suggests an affirmative intention to repeal § 357.

In arguing repeal by implication, Tabbytite relies on *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna,* 542 F.2d 1375 (10th Cir. 1976). There, the act of May 10, 1926, 44 Stat. 498, which allowed condemnation of the lands of the Pueblo Indians in New Mexico, was repealed by implication by the act of April 21, 1928, 45 Stat. 442, currently 25 U.S.C. § 322, and, by way of dictum, by the act of February 5, 1948. The test for repeal by implication was:

> There are two-well settled categories of repeals by implication:
>
> 1. Where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict con-

stitutes an implied repeal of the earlier one; and

2. If the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act (at 1376).

The court held that the 1928 act was clearly intended to operate as a substitute (1377, 1378) and was so inconsistent with the 1926 act that it, alone, was held to repeal that act (1379).

The court also ruled, by way of dictum, that the 1926 act was also repugnant to the act of February 5, 1948. However, it acknowledged that:

> Although the 1948 act may be considered as an independent basis of repeal by implication, it may also be considered as accumulative to the 1928 act. As will be discussed later, the two form may comprehensive scheme. We believe there is a positive repugnancy between the 1948 act and the 1926 act, but this does not negate the probability that Congress considered the 1926 act already repealed (1379).

This is not persuasive authority for assertion that the 1948 Act repealed § 357 by implication. It dealt with condemnation of tribal, not individual allotment lands. Neither § 311 or § 357 were mentioned in the case. It was limited to a unique statute, dealing with a unique tribal institution, Pueblo lands (1377), the only lands of any tribe subject to condemnation. The case was rendered moot by the congressional enactment of what are now 25 U.S.C. § 322 and § 322A nearly a month before the decision was announced. In 25 U.S.C. § 322 the continued viability of § 3 and § 4 of the act of March 3, 1901, which contains both § 311 and § 357 was expressly recognized.

Significantly, a year after the case was decided, the same court for the Tenth Circuit, in *Transok Pipeline Company v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977) ruled that § 311 and § 357 were valid, independent, alternative powers for acquisition of rights-of-way, acknowledging that § 357 does not require consent of the Secretary of the Interior. This court

declined to review this holding through a writ of certiorari 435 U.S. 1006 (1978).

In considering whether there was an implied repeal of the condemnation provisions of § 357, including destruction of all potential causes of action in the nature of inverse condemnation for Indian allottees, the 1948 act should be construed in light of its impact upon the Indian. However, finding a repeal by implication could seriously prejudice Indian allottees (see the discussion on *Albers v. California,* 398 P.2d 129 (Cal. 1965) on pages 23-27, *supra.*

THIS COURT SHOULD NOT CONSIDER POINTS RAISED FOR THE FIRST TIME ON APPEAL.

Neither of the argument that § 311 controls, to the exclusion of § 357, nor the argument that § 357 was repealed by implication by the 1948 act was raised before either the District Court or the Ninth Circuit Court of Appeals. Normally, issues not raised before the Court of Appeals should not be considered by this court. *Neely v. Eby Construction Company,* 386 U.S. 317, 330 (1967).

The issues in *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo Lagona,* 542 F.2d 1375 (10th Cir. 1976) concerning whether the 1926 act dealing with Pueblo lands was viable had been resolved by the Congress, through enactment of 25 U.S.C. § 322, 322A a month before the court issued its decision. Since that issue is moot, it should not trouble this Court in the future.

Similarly, the issue whether § 311 controls to the exclusion of § 357 should not be considered by this court since it was not presented to the Ninth Circuit. There is no conflict of circuit court decisions concerning whether § 311 and § 357 are valid, independent, alternate remedies for acquiring rights-of-way. *United States v. Minnesota,* 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus v. Washington Power Company,* 264 F.2d 614 (9th Cir. 1959); *City of Okemah, Oklahoma v. United States,* 140 F.2d 963, 966 (10th Cir. 1944); *United States v. Oklahoma Gas and Electric Company,* 127 F.2d 349, 354-355 (1942), *aff'd* 318

U.S. 206, 214 (1943); *Transok Pipeline Company v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), *cert. denied* 435 U.S. 1006 (1978).

TAKING PRIVATE PROPERTY THROUGH INVERSE CONDEMNATION IS NEITHER UNCONSTITUTIONAL NOR UNFAIR, PARTICULARLY UNDER THE PRESENT CIRCUMSTANCES.

Tabbytite's Brief states, on pages 30-31 that:

> It is undisputed that the United States and Tabbytite were not notified of any alleged taking when Anchorage took over control and maintenance of the road. On its face, this constitutes a blatant violation of the procedural due process that is guaranteed by the Fifth and Fourteenth Amendments . . . in the circumstances presented here a taking of property by seizure would be unconstitutional.

It continues, on page 34, note 21:

> While Anchorage's predecessors had claimed that they enjoyed an easement of necessity across Tabbytite's allotment, that issue had been resolved in favor of Tabbytite and the United States prior to Anchorage's first appearance in this case. See Brief in Opposition to Certiorari at 3-4.

The Brief continues:

> There is no conceivable excuse for the failure or refusal to provide notice and a opportunity to be heard under these circumstances. (34)

These statements approach innuendo.

It is probably true that after Anchorage began maintenance of the road as a consequence of unification in September, 1975 and through the winter months which preceded the Ninth Circuit's decision in February 1976, no notice was given to Tabbytite that the road was being maintained as a Municipal street. There was neither moral nor legal reason to do so. Anchorage had succeeded to all interests and liabilities of Glen

Alps upon unification. Between that date and February, 1976 when the Ninth Circuit ruled, it *was* the prevailing party in litigation which had lasted for over six years. Between August 24, 1972 and February, 1976, pursuant to the Memorandum and Order of August 24, 1972 and that of October 3, 1973, that an easement of necessity existed across the Tabbytite land, (Pet. App. F), the City of Glen Alps, and thereafter the Municipality, maintained the road as a matter of right. It is not customary for a prevailing party in long-standing litigation, acting under court order, to repeatedly notify the losing party that it is exercising the rights ordered by the court and that the losing party should come forth and be heard again.

Tabbytite has been an active, participating party, as Intervenor in this action since June, 1972. She has been represented by counsel. She participated actively in the three-day trial on the merits in June, 1972 and, while represented by counsel, had every opportunity for cross-examination. Maintaining a road through the rigors of an Alaskan winter pursuant to a final judgment of the United States District Court, a decision which had not yet been overturned, is hardly high-handed behavior which "constitutes a blatant violation of the procedural due process that is guaranteed by the Fifth and Fourteenth Amendments." Similarly, failure to notify the losing party to litigation over a road that the road is being maintained pursuant to court order hardly constitutes basis for the allegation that "[T]here is no conceivable excuse for the failure or refusal to provide notice and an opportunity to be heard under these circumstances."

After the Ninth Circuit rendered its decision in February, 1976, the Municipality promptly entered an appearance. (Statement, Facts, Pars. 5, 7). Promptly after the file was returned to Anchorage from San Francisco so that the basis of the litigation could be examined by the new party, good faith litigation was begun to determine whether the road had been taken through inverse condemnation. (R:11-12; 13-40; 48-65). Tabbytite, as an Intervenor, was a party to this litigation. She has not alleged that she did not receive every pleading, motion or memorandum that was served upon every other party.

Therefore it is difficult to understand the allegation that "in the circumstances presented here a taking of property by seizure would be unconstitutional."

As a matter of law, failure to provide notice prior to a taking in the nature of inverse condemnation has never been held by this Court to constitute a constitutional infirmity. As this Court indicated in *Hurley v. Kincaid*, 285 U.S. 95, 104-105, 76 L.Ed. 637, 643 (1932), when the United States threatened to overflow a plaintiff's land the Court said:

> For even if the defendants are acting illegally, under the act, and threatening to proceed without first obtaining flowage rights over the complainant's lands, the only illegality, on complainant's own contention, is confined to the failure to compensate him for the taking and afford no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle him to be paid in advance of the taking. [Citations omitted.]

Lack of prior notice and opportunity to be heard did not affect the takings in inverse condemenation in *United States v. Causby,* 328 U.S. 256, 90 L.Ed. 1206 (1946); *Griggs v. Allegany County,* 369 U.S. 84, 7 L.Ed. 585 (1962) or *Myers v. United States,* 323 F.2d 580, 582-583 (9th Cir. 1963).

Nor has the Alaska Supreme Court required prior notice and opportunity to be heard before a taking in inverse condemnation may occur.*State Department of Highways v. Crosby,* 410 P.2d 724, 728-729 (Alaska 1966); *City of Anchorage v. Nesbett,* 530 P.2d 1324 (Alaska 1975); *Wickwire v. City and Borough of Juneau,* 557 P.2d 783 (Alaska 1976); *Grant v. State of Alaska,* 560 P.2d 36 (1977), regardless of the procedural statutes of Alaska eminent domain law set forth on pages 35-36 of the Tabbytite Brief or those set forth in its App. B.

Schroeder v. City of New York, 31 U.S. 208 (1962) and *Walker v. City of Hutchinson,* 352 U.S. 112 (1956) require prior notice by the best practicable means to the property owners only to give them an opportunity to participate in adjudication of just compensation. Neither dealt with a fact situation reminiscent of inverse condemnation.

Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), has no relevance to a case in the nature of inverse condemnation. It dealt with the authority of the Alaska Housing Authority to exercise a declaration of taking. The Alaska Supreme Court recognized that the declaration of taking is not a mere procedural tool in eminent domain; it is a distinct, substantive right, sparingly given by the legislature. Like the Federal Declaration of Taking Act, after which it was patterned, it is an extraordinary remedy on the part of the condemnor. (See *Arco Pipeline Company v. Stewart,* 539 P.2d 64. (Alaska 1975)). For this reason, these cases discussed on pages 35-36 of the Tabbytite brief, which rely upon a declaration of taking, have no relevance whatsoever to a taking in the nature of inverse condemnation.

In short, Tabbytite has been accorded due process. The United States has acknowledged the authority of the Municipality to condemn the road in question (App: 41). A three-day trial on the merits, in which Tabbytite was both represented by counsel and was an active participant with every opportunity to cross-examine, elicited uncontradicted expert testimony that the road, as now situated, is placed in a position which is practical and suitable to both public and private need. (Statement, Facts, Par. 9). The Municipality has both maintained the road and engaged in this litigation in good faith and has stipulated since 1976 that the issue of just compensation could be adjudicated in the Federal District Court in this action at any time the United States and Tabbytite were willing to do so. (R:60; Statement, Issue of Law)

CONCLUSION

In 1901, when Congress enacted § 357, it intended to place allottees of Indian lands in severalty on an equal basis with every owner of land in fee simple in the state situated, under the eminent domain laws of that state. At the time the act was enacted, both widespread federal and state practice acknowledged a cause of action in eminent domain by which property could be taken for public purpose without prior filing of formal eminent domain proceedings, but with an implied contract that the owner must either be paid just compensation or the condemnor ejected; a taking sometimes known as seizure, and now known as inverse condemnation. Contemporaneous federal statutes between 1880 and 1916, using such words "condemn" and "condemned under judicial process" were construed by this Court, between 1883 and 1924 to authorize "condemnation" through seizure or, what is now known as inverse condemnation.

There is no reason to ignore the plain wording of § 357. The manner and procedure of the taking are to be determined by the state, not federal, law. If state law allows the taking in the nature of inverse condemnation, state law controls. If it does not, state law also controls.

Finally, as the Ninth Circuit Court of Appeals observed in this case in 590 F.2d 465, 765, 767 (1979), (R: App. A):

> To us it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights. Allowing condemnation suits will encourage states and political subdivisions to act with more circumspection not less, when governmental activities conflict with ownership rights of Indian trust lands.

To deny Indian allottees the same constitutional right to a cause of action in inverse condemnation which is available to other American citizens under the guise of protecting their rights would be a disservice to the class by denying them an almost boundless tool for preventing any state or municipal

government from imposing upon them a disproportionate share of the cost of any public improvement (see discussion concerning *Albers v. California,* 398 P.2d 129 (Cal. 1965), pages 23-27, *supra.*.

The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Richard Arthur Weinig
Assistant Municipal Attorney
Municipality of Anchorage, Alaska

December, 1979

APPENDIX C

Act of Congress approved *July 15, 1882, 22 Stat. at L. 168, entitled "An Act to Increase the Water Supply of the City of Washington,* and for Other Purposes." The Act provides for a survey and map of the land necessary to extend the Washington Aqueduct to the high ground north of Washington, near Sixth Street extended, and of the land necessary for a reservoir at that point. But it also contains the following provisions:

The Secretary of War shall cause to be made *** a like survey and map of the land necessary for a dam across the Potomac River at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made, the Secretary of War and the Attorney-General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and to the land on which the gate house at Great Falls stands by condemnation: *** *And provided further,* That if it shall be necessary to resort to condemnation, the proceeding shall be as follows:

When the map and survey are completed, the Attorney-General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this Act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney-General, the Chief Justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the Government, or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney-General a description of any tract or parcel the ownership of which is claimed

separately, to fairly and justly value the same and report such valuation to the Attorney-General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof; and if the offer be accepted, then, upon the execution of a deed to the United States in form satisfactory to the Attorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this Act.

In making the valuation the appraisers shall only consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this Act.

The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States, setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein; *Provided,* That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made, as hereinbefore authorized, and who shall have declined to accept the

same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney-General as above directed, be forever barred; *Provided,* That owners or claimants laboring under any of the disabilities defined in the Statute of Limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and, upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

Sec. 2. That the Secretary of War be, and is hereby, authorized and directed to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington near Sixth street extended; and that he construct at that point a reservoir of the capacity of not less than three hundred millions gallons, erect the necessary gatehouse, and lay such main-connections as may be necessary to furnish to Washington and Georgetown an ample supply of water; and that he complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same at that level across Conn's Island to the Virginia shore; and that he raise the embankment between the Potomac River and the Chesapeake and Ohio Canal above the dam, so as to protect the canal from the increased flooding which the completion of the dam will cause in times of high water, or to pay to the canal company, in full satisfaction for all such flooding, the amount hereinafter appropriated for that purpose.

Sec. 3. That the following sum or so much thereof as may be necessary are hereby appropriated out of any money in the treasury not otherwise appropriated:***

To pay for water rights and land necessary to extend dam at Great Falls to the Virginia shore, forty-five thousand dollars.

For work and material to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same to the Virginia shore, one hundred and forty-five thousand one hundred and fifty-one dollars.

To protect the Chesapeake and Ohio Canal from increased flooding by reason of completing the dam at Great Falls, twelve thousand three hundred dollars.

To provide for the erection of suitable fishways at the Great Falls of the Potomac, and at the dam to be constructed under the provisions of this Act, in accordance with plans and specifications to be prescribed by the United States Commissioner of Fish and Fisheries, fifty thousand dollars, or so much thereof as may be necessary.''

APPENDIX D

Chap. 1001—An act authorizing the establishing of a public park in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a tract of land lying on both sides of Rock Creek, beginning at Klingle Ford Bridge, and running northwardly, following the course of said creek, of a width not less at any point than six hundred feet, nor more than twelve hundred feet, including the bed of the creek, of which not less than two hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park: *Provided, however,* That the whole tract so to be selected and *condemned* der the provisions of this act shall not exceed two thousand acres nor the total cost thereof exceed the amount of money herein appropriated.

Sec. 2. That the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, be, and they are hereby, created a commission to select the land for said park, of the quantity and within the limits aforesaid, and to have the same surveyed by the assistant to the said Engineer Commissioner of the District of Columbia in charge of public highways, which said assistant shall also act as executive officer to the said commission.

Sec. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof vested in the United States, subject to the payment of just compensation, to be determined by said commission, and approved by the President of the United States: Provided, That such compensation be accepted by the owner or owners of the several parcels of land.

That if the said commission shall be unable by agreement with the respective owners to purchase *all of the land so selected and condemned* within thirty days *after such condemnation,* at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, as far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such application, without delay, to notify the owners and occupants of the land, if known, by personal service, and if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court; and when the value or values of such land are thus ascertained, and the President of

the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee simple shall in like manner be vested in the United States.

Sec. 4. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession.

Sec. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America and managed by the commission.

Sec. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem

the said real estate specially benefited. The commission shall give at least day days' notice, in one daily newspaper published in the city of Washington, of the time and place of their meeting for the purpose of making such assessment and may adjourn from time to time till the same be completed. In making the assessment the real estate benefited shall be assessed by the description as appears of record in the District on the day of the first meeting; but no error in description shall vitiate the assessment: *Provided,* That the premises are described with substantial accuracy. The commission shall estimate the value of the different parcels of real estate benefited as aforesaid and the amount assessed against each tract or parcel, and enter all in an assessment book. All persons interested may appear and be heard. When the assessment shall be completed it shall be signed by the commission, or a majority (which majority shall hav e power always to act), and be filed in the office of the clerk of the supreme court of the District of Columbia. The commission shall apply to the court for a confirmation of said assessment, giving at least ten days's notice of the time thereof by publication in one daily newspaper published in the city of Washington, which notice shall state in general terms the subject and the object of the application.

The said court shall have power, after said notice shall have been duly given, to hear and and determine all matters connected with said assessment; and may revise, correct, amend, and confirm said assessment, in whole or in part, or order a new assessment in whole or in part, with or without further notice or on such notice as it shall prescribe; but no order for a new assessment in part, or any partial adverse action, shall hinder or delay confirmation of the residue, or collection of the assessment thereon. Confirmation of any part of the assessment shall make the same a lien on the real estate assessed.

The assessment, when confirmed, shall be divided into four equal installments, and may be paid by any party interested in full or in one, two, three, and four years, on or before which times all shall be payable, with six per centum annual interest on all deferred payments. All payments shall be made to the

Treasurer of the United States, who shall keep the account as a separate fund. The orders of the court shall be conclusive evidence of the regularity of all previous proceedings necessary to the validity thereof, and of all matters recited in said orders. The clerk of said court shall keep a record of all proceedings in regard to said assessment and confirmation. The commission shall furnish the said clerk with a duplicate of its assessment book, and in both shall be entered any change made or ordered by the court as to any real estate. Such book filed with the clerk when completed and certified shall be prima facie evidence of all facts recited therein. In case assessments are not paid as aforesaid the book of assessments certified by the clerk of the court shall be delivered to the officer charged by law with the duty of collecting delinquent taxes in the District of Columbia, who shall proceed to collect the same as delinquent real estate taxes are collected. No sale for any installment of assessment shall discharge the real estate from any subsequent installment; and proceedings for subsequent installments shall be as if no default had been made in prior ones.

All money so collected may be paid by the Treasurer on the order of the commission to any persons entitled thereto as compensation for land or services. Such order on the Treasurer shall be signed by a majority of the commission and shall specify fully the purpose for which it is drawn. If the proceeds of assessment exceed the cost of the park the excess shall be used in its improvement, under the direction of the officers named in section eight, if such excess shall not exceed the amount of ten thousand dollars. If it shall exceed that amount that part above ten thousand dollars shall be refunded ratably. Public officers performing any duty hereunder shall be allowed such fees and compensation as they would be entitled to in like cases of collecting taxes. The civilian members of the commission shall be allowed ten dollars per day each for each day of actual service. Deeds made to purchasers at sales for delinquent assessments hereunder shall be prima facie evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been made;

that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally.

Any judgment for the sale of any real estate for unpaid assessment shall be conclusive evidence of its regularity and validity in all collateral proceedings except when the assessment was actually paid, and the judgment shall estop all persons from raising any objection thereto, or to any sale or deed based thereon, which existed at the date of its rendition, and could have been presented as a defense to the application for such judgment.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto, the sum of one million two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided,* That one-half of said sum of one million two hundred thousand dollars, or so much thereof as may be expended, shall be reimbursed to the Treasury of the United States out of the revenues of the District of Columbia, in four equal annual installments, with interest at the rate of three per centum per annum upon the deferred payments: *And provided further,* That one-half of the sum which shall be annually appropriated and expended for the maintenance and improvement of said lands as a public park shall be charged against and paid out of the revenues of the District of Columbia, in the manner now provided by law in respect to other appropriations for the District of Columbia, and the other half shall be appropriated out of the Treasury of the United States.

Sec. 7. That the public park authorized and established by this act shall be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, whose duty it shall be, as soon as practicable, to lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footways for pedestrians; and whose duty it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible.

[Emphasis added.]

Approved, September 27, 1890

APPENDIX E

43 U.S.C.A. § 421 Acquisition of lands for irrigation project; eminent domain

Where, in carrying out the provisions of sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491 and 498 of this title, it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under such sections, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice. June 17, 1902, c. 1093, § 7, 32 Stat. 389.

APPPENDIX F

40 U.S.C § 257. Condemnation of realty for sites and other uses

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

Aug. 1, 1888, c. 728, § 1, 25 Stat. 357; June 25, 1948, c. 646, § 6, 62 Stat. 986.

APPENDIX G

Act of April 24, 1888, 25 Stat. 94, CHAP. 194 — An act to facilitate the prosecution of works projected for the improvement of rivers and harbors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the *acquirement by condemnation* of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; *such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: *And provided further,* That the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works.

Approved, April 24, 1888.

APPENDIX H
INDIAN LANDS—RIGHTS-OF-WAY ACROSS

For text of Act see p. 16

House Report No. 739, June 30, 1947
[To accompany H.R. 3322]
Senate Report No. 823, Jan. 14, 1948
[To accompany H.R. 3322]

The Senate Report repeats in substance the contents of the House Report, and contains a more detailed analysis of the legislation

Senate Report No. 823

The Committee on Public Lands, to whom was referred the bill (H.R. 3322) to facilitate rights-of-way through Indian lands, having considered same, report thereon with the recommendation that it do pass with the following amendment:

Strike out all after the enacting clause and insert the following:

That the Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

Sec. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devicees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Sec. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

Sec. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.

Sec. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

Sec. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

Sec. 7. This Act shall not become operative until thirty days after its approval.

This bill has been considered by the Committee on Public Lands of the House; on June 30, 1947, that committee submitted its report (H. Rept. No. 739) to the House, recommending its passage, and on July 7, 1947, it passed the House.

On April 11, 1947, an identical bill (S. 1095) was introduced in the Senate which was referred to your committee for consideration.

Subsequent to the receipt by your committee of H.R. 3320, and prior to the time that your committee had an opportunity to give consideration to H.R. 3322, the Secretary of the Interior, under the date of July 10, 1947 submitted his report on S. 1095, suggesting that there is a real need for additional legislation relating not only to the right-of-way on Osage Indian lands but also to the rights-of-way on Indian lands of all reservations and recommended that the text of S. 1095 (which text is identical with the text of H.R. 3320) be stricken and that the text of a substitute draft be inserted in its stead, which text of the said substitute draft is identical with the amendment recommendation herein. Also under date of July 22, 1947, the Secretary of the Interior transmitted a communication to the President of the Senate urging the enactment of legislation relating to rights-of-way on Indian lands of all reservations, who referred the same to your committee for consideration, which proposed legislation was submitted in form of a proposed bill, which is identical with the text of the amendment recommended herein.

It is the judgment of your committee that there is a real need for additional legislation relating to rights-of-way on Indian lands of all reservations; therefore your committee recommends that this bill, as amended, be enacted.

A full explanation of the purposes of this proposed legislation is contained in House Report 739; the Secretary of the Interior's report on S. 1095, dated July 10, 1947; and the Secretary of the Interior's letter to the President of the Senate dated July 22, 1947, copies of which are appended hereto and made a part of this report, as follows:

[H. Rept. No. 739, 80th Cong., 1st sess.]

The Committee on Public Lands, to whom was referred the bill (H.R. 3322) to facilitate rights-of-way through restricted Osage Indian land, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

Department of the Interior
Washington 25, D.C., July 10, 1947.

Hon. Hugh Butler,
Chairman, Committee on Public Lands,
United States Senate.

My Dear Senator Butler: Further reference is made to your request for a report on S. 1095, a bill to facilitate rights-of-way through restricted Osage Indian land, and for other purposes.

I am in accord with the primary purpose sought to be accomplished by the bill. As a matter of fact, there is real need for additional legislation relating not only to the rights-of-way on Osage lands but also to the rights-of-way on Indian lands of all reservations. I recommend, therefore, that all of the text of S. 1095 be stricken and that the text of the enclosed substitute draft be inserted in its stead. If this is done, the title of the bill should also be changed to conform to the substitute draft.

This proposed substitute draft has already been submitted to the Bureau of the Budget with a draft of a proposed report, copy of which is also attached and which is self-explanatory. The comments of the Bureau of the Budget have not yet been received, and therefore no commitment can be made concerning the relationship of the proposed legislation and the accompanying report thereon to the program of the President.

Sincerely yours,

Oscar L. Chapman
Under Secretary of the Interior.

The amendment is as follows:

Page 1, line 4, strike out the comma following the word "easements" and insert in lieu thereof "upon just compensation, and".

EXPLANATION OF THE BILL

The purpose of this bill is to simplify the granting of rights-of-way across certain Osage Indian lands in Oklahoma.

The present procedure whereby an easement deed must be executed by the owner of the land on which a right-of-way is desired creates an excessive amount of work for the Osage Indian Agency, causes additional expense for the tribe, retards the processing of applications for rights-of-way, delays the time when the Indians are finally compensated for such rights-of-way, and leads to considerable dissatisfaction on the part of both applicants and Indians.

This legislation was introduced at the request of the tribes concerned through their tribal council. It would not apply to those Indians having certificates of competency or those over whose property the Secretary of the Interior does not now have jurisdiction. At hearings held on this bill, representatives of the Bureau of Indian Affairs, Department of the Interior, requested its passage.

The Committee on Public Lands unanimously recommends enactment of H.R. 3322.

Department of the Interior,
Washington, July 22, 1947.

Hon. Arthur H. Vandenberg,
President pro tempore of the Senate.

My Dear Senator Vandenberg: There is transmitted a proposed bill to empower the Secretary of the Interior to grant rights-of-way for any purpose over individually and tribally owned Indian lands.

For the reasons hereinafter stated, I strongly urge enactment of the proposed legislation.

It will go a long way to satisfy the need for simplification and uniformity in the administration of Indian law. At the present time the authority of the Secretary of the Interior to grant rights-of-way is contained in many acts of Congress, dating as far back as 1875. Thus, each application for a right-of-way over Indian land must be painstakingly scrutinized in order to make certain that the right-of-way sought falls within a category specified in some existing statute, which may limit the type of right-of-way that may be granted, or the character of the land across which it may be granted.

For example, the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), which authorize the granting of transmission line rights-of-way, are limited in their application to "reservations of the United States," which have been held to include only those individual Indian allotments within the original boundaries of Indian reservations which were not extinguished by cession to the United States. These acts are also inapplicable to individual Indian allotments on the public domain. There would seem to be no persuasive reason for maintaining such artificial distinctions.

When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior. Very often as many as 15 to 20 individual Indians own undivided interests in 1 parcel of land and the signatures of all owners must be obtained. As a general rule these owners are widely scattered and frequently one or more of them are deceased and their heirs have not been determined. Thus, years may elapse before all of the owners' signatures can be obtained. As a practical matter, the burden of obtaining signatures to easement deeds falls on this Department and becomes a time and money consuming operation. In a great many cases the value and amount of land required for a right-of-way is very little and the cost to the United States in time and money is very high.

The proposed legislation would vest in the Secretary of the Interior authority to grant rights-of-way of any nature over the Indian lands described in the bill. The bill preserves the powers of those Indian tribes organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984); the act of May 1, 1936 (49 Stat. 1250), extending certain provisions of that act to Alaska; and the Oklahoma Welfare Act of June 26, 1936 (49 Stat. 1967), with reference to the disposition of tribal land. It permits the Secretary to grant rights-of-way over individually owned Indian lands without the consent of the owners thereof in four specified classes of cases where a requirement that the consent of all parties in interest be obtained would operate, from a practical standpoint, to the disadvantage of the Indians.

In order to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new, provision has also been made in section 4 of the bill to preserve the existing statutory authority relating to rights-of-way over Indian lands.

Section 5 of the bill broadens existing powers of condemnation over individually owned Indian lands.

The Bureau of the Budget has advised me that there is no objection to the presentation of this proposed legislation to the Congress.

Sincerely yours,

Oscar L. Chapman,
Under Secretary of the Interior.

Amend the title so as to read:

A bill to empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands, or nations.

APPENDIX I

STATUTES

Alaska Statute 29.68.240

Unification of local governments authorized. An organized borough and all cities within the borough may unite to form a single unit of home rule local government by complying with this chapter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.250

Unification to be proposed by petition. (a) formation of a charter commission to propose a unification charter shall be proposed by resolution of the assembly or by petition. An assembly resolution for the purpose may be adopted not more often than once every 12 months.

(b) The borough assembly, a city council or a person living within the area of proposed unification may initiate the petition. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.260

Petition requirements. (a) The petition shall read:

"PETITION FOR ELECTION OF CHARTER COMMISSION TO PROPOSE UNIFICATION CHARTER

We, the undersigned, qualified voters of the Borough do hereby petition that the following proposition be placed before the voters as provided by law:

'Shall a charter commission be formed (and charter commission members be elected as elsewhere provided on this ballot) to prepare, adopt and submit to the voters for their approval or rejection a proposed charter uniting the Borough and all cities within it as a single unit of home rule government having the powers, duties and functions of a unified government as authorized by law?

Yes [ ] No [ ]

Signature	Address	Inside First Class or Home Rule City	Outside First Class or Home Rule City"

(b) The petition shall be signed by at least:

(1) That number of qualified voters of the borough living outside all first class and home rule cities in the borough equal to 25 per cent of the qualified voters who voted in the last regular borough election; and

(2) That number of qualified voters residing in each first class and home rule city located in the borough equal to 25 per cent of the qualified voters who voted in the last regular borough election in each city. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.270

Review of petition. Upon recepit of a petition, the borough assembly shall review the petition within 15 days after its receipt to determine whether it complies with § 260 of this chapter. If the petition does not meet the designated requirements, it shall be immediately returned to the person who initiated the petition with a statement indicating which requirements have not been satisfied. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.280

Call for charter commission nominations. Once it is determined by the borough assembly that a petition meets the requirements of § 260 of this chapter, or the assembly by its resolution proposes an election on formation of a charter commission to propose a unification charter, the assembly shall issue a call for the nomination of charter commission candidates, specifying the filing deadline and outlining the procedure described by making nominations under § 290 of this chapter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.290

Nomination of charter commission candidates. (a) Charter commission candidates shall be nominated by petition signed by at least 50 qualified voters of the area from which the candidate seeks election or by a number of qualified voters from that area equal to at least 10 per cent of the number of votes cast from that area in the last regular borough election, whichever is less.

(b) Nomination petitions shall be filed with the borough clerk on or before the date fixed by the borough assembly, which date shall not be less than 30 days after notice of the call for nominations has been given through the borough. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.300

Qualifications of charter commission candidates. A person is eligible to be nominated as a candidate for the charter commission if he has been a qualified voter of the area from which he seeks election for at least one year immediately preceding the date his nomination petition is filed with the borough clerk. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.310

Composition of charter commission. The charter commission members shall be qualified voters and shall consist of 11 members, three of whom shall be residents elected at large from the area of the borough and eight of whom shall be (1) residents of and elected from the area outside cities in the borough or (2) residents of and elected from a city or cities in the borough. The number representing each of these areas shall be proportionate to the respective population as determined by the Department of Community and Regional Affairs. (§ 2 ch 118 SLA 1972; am § 9 ch 200 SLA 1972)

Alaska Statute 29.68.320

Election. (a) After receipt of a valid petition or adoption of an assembly resolution for the purpose, the borough assembly

shall submit to the voters the question of whether that borough and all cities within it shall unite to form a single unit of home rule government. The vote shall be held at the next regular borough election scheduled at least 90 days after receipt of the valid petition or adoption of the resolution.

(b) The ballot on the question of unification shall be worded exactly as in § 260(a) of this chapter.

(c) The election of charter commission members shall take place at the same time as the election on the question of unification.

(d) All costs incurred in conducting an election under this chapter shall be paid by the borough. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.330

Requirements for approval of unification and election of charter commission. (a) The votes on unification shall be tabulated in two separate classifications. One classification shall consist of all votes cast in the first class and home rule cities of the borough. The other classification shall consist of all votes cast in the remaining areas of the borough. In order for unification to be approved, it is necessary that a majority of the votes in each classification favor unification.

(b) If unification is approved, those charter commission candidates who received the highest number of votes from their respective areas shall serve as members of the commission. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.340

Charter commission organization and procedure. (a) The charter commission authorized by this chapter shall hold its first meeting within 30 days of the date of certification of its election. The commission shall elect from among its members a chairman and a deputy chairman.

(b) A majority of the total membership of the charter commission constitutes a quorum. No decision of the commission is valid or binding unless approved by that number of members necessary to constitute a quorum.

(c) The charter commission may elect other offices from among its membership, adopt rules governing its procedures and hire and discharge commission employees. Rules adopted must conform with the provisions of this chapter.

(d) Meetings of the charter commission shall be open to the public at all times. A journal of commission proceedings shall be kept and shall be available for public inspection at the borough offices.

(e) Except as provided in § 390(e) of this chapter, vacancies on the charter commission shall be filled by a majority vote of the commission. The person appointed to fill a vacancy must be a qualified voter of the same area as the person whom he succeeds and must have been a qualified voter of that area for at least one year immediately preceding the date of his appointment.

(f) The borough assembly may grant a per diem allowance to the commission members and may reimburse the members for travel expenses incurred in carrying out the duties prescribed by this chapter.

(g) Costs, fees, and other expenses incurred by the charter commission are a debt of the borough and shall be paid upon proper verification. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.350

Charter preparation. (a) A charter commission established under this chapter shall prepare, adopt and submit a proposed home rule charter for the area to be unified to the voters for approval or rejection at a regular or special borough election called by the borough assembly held within 60 days of the date of publication and posting of the proposed charter as required in § 380 of this chapter. The charter shall include among its provisions.

(1) provisions for adjustment of existing bonded indebtedness and other obligations in a manner which will reserve a fair and equitable burden of taxation for debt service, subject to § 410 of this chapter;

(2) Provisions for the establishment of

(A) service areas;

(B) sections, if desired; and

(C) reapportionment of the sections, if established;

(3) provisions for nonpartisan government and provision for the selection, organization, authority and responsibilities of the governing body and its executive and administrator;

(4) the transfer or other disposition of property and other rights, claims, assets and franchises of the local government to be unified under the charter;

(5) provision for exercise of the rights of initiative and referendum as required by A.S. 29.13.050;

(6) a method of amending the charter;

(7) the date on which the charter, if approved at the charter election required by § 390 of this chapter, is effective;

(8) designation of the new municipality's official name, subject to the provisions of (b) of this section;

(9) other charter provisions which the charter commission elects to include and which may be included in a home rule charter under this chapter and the state constitution.

(b) The area to be unified shall be known as a borough or a city or by some other designation consistent with existing law. (§ 2 ch 118 SLA 1972; am § 6 ch 147 SLA 1972)

Alaska Statute 29.68.360

Public hearings. Both before and after drafting the proposed charter, the charter commission shall hold a public hearing in each area of the borough represented on the borough assembly. Other public hearings may be held by the charter commission whenever and wherever it believes necessary and appropriate. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.370

Filing of proposed charter. Upon the adoption of a proposed home rule charter by the charter commission, the charter shall be signed by at least a majority of the total membership of the commission and shall be filed with the borough clerk. A copy with signatures affixed shall also be filed with the clerk of each city within the borough. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.380

Publication and posting of proposed charter. Within 10 days after filing the proposed charter, the borough clerk shall have it published once in at least one newspaper having general circulation distributed within the borough, if there is a newspaper having general circulation distributed within the borough. In addition, the clerk shall have a copy of the proposed charter posted in at least three public places within each city of the borough and each area outside cities. Copies of the proposed charter shall be made available by the borough assembly to the public at both the office of the borough clerk and the office of the clerk of each city within the borough. The clerk shall publish notice by radio and television of the publication, posting and availability of the proposed charter in a manner intended to apprise the entire borough population of the existence of the proposed charter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.390

Election on charter. (a) The proposed charter adopted by the charter commission shall be submitted to the voters for ratification or rejection at the borough election specified in § 350 of this chapter. The borough clerk shall prepare the ballots for use in the election and shall give published notice of and otherwise conduct the election in the manner in which regular municipal elections are conducted. In addition, the clerk shall publish notice of the election by radio and television in a manner intended to apprise the entire borough population of the election.

(b) A person who is a qualified voter of the borough may vote in the election on the proposed charter.

(c) If a majority of the votes cast in the area of the borough outside all first class and home rule cities and a majority of the votes cast in the remaining area of the borough, composed of all first class and home rule cities, are cast in favor of the proposed charter, the charter is ratified. If the charter is ratified, two copies of the charter shall be filed with each of the following authorities:

(1) lieutenant governor;

(2) commissioner of the Department of Community and Regional Affairs;

(3) district recorder for the area of the borough;

(4) clerk of the borough;

(5) clerk of each city in the borough.

(d) If a proposed charter is rejected, the charter commission shall prepare, adopt and submit a proposed charter to the voters at a general or special borough election called by the borough and held within one year of the date of the first charter election. If the second proposed charter is also rejected, the charter commission shall be dissolved and the question of unification shall be treated as if it had never been proposed or approved.

(e) If after the rejection of the first proposed charter, more than one-half of the charter commission members resign from the commission, the borough assembly shall appoint new members to fill the vacancies in accordance with § 110(e) of this chapter. (§ 2 ch 118 SLA 1972; am § 9 ch 200 SLA 1972)

Alaska Statute 29.68.400

Effect of the charter after ratification. Upon ratification, the charter of a unified municipality organized under §§ 240-440 of this chapter operates to dissolve all local governments within the area of unification in accordance with the charter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.410

Assets and liabilities. A municipality created by unification shall succeed to all the assets and liabilities of the local governments it unified. A bonded indebtedness or other debt incurred before unification shall remain the tax obligation of the area which contracted the debt, except that the tax obligation may be spread over a larger area by ordinance if the governing body determines that the asset for which the bonded indebtedness or other debt was incurred was used for the benefit of the larger area before unification, or is so used after unification. However, preunification bonded indebtedness or other debt for sewage collection systems, water distribution systems, and streets, even if determined to be used for the benefit of a larger area than that which incurred the debt, shall remain the tax obligation of the area which incurred the debt. (§2 ch 118 SLA 1972)

Alaska Statute 29.68.420

Ordinances. Within two years after ratification of the charter, the governing body of the unified municipality shall revise, repeal or reaffirm all borough and city ordinances, resolutions and orders in force within the borough at the time of unification. Each ordinance, resolution, regulation or order in force at the time of unification shall remain in force until superseded by action of the new governing body. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.430

Right to state and federal funds preserved. All provisions of law authorizing contributions of any kind, in money or otherwise, from the state or federal government to boroughs and cities shall remain in full force and effect with respect to a unified municipality organized under §§ 240-440 of this chapter. (§ 2 ch 118 SLA 1972)

Alaska Statute 29.68.440

Powers of a unified municipality. A municipality organized under §§ 240-440 of this chapter shall have all powers:

(1) not prohibited it by law or charter;

(2) granted to organized Boroughs and first class cities. (§ 2 ch 118 SLA 1972)

APPENDIX J

Anchorage Charter § 19.08

Existing Rights and Liabilities Preserved. (a) Except as otherwise provided in this Charter, all rights, title, actions, suits, franchises, contracts and liabilities and all civil, criminal or administrative proceedings shall continue unaffected by the ratification of this Charter. The new government shall be the legal successor to the former governments for this purpose.

(b) Any bond of a former government authorized and unissued on the date of ratification or authorized at the elections provided in Section 19.02 remains authorized and may be issued at the discretion of the Assembly without additional ratification and subject to the procedure provided by law.

Anchorage Charter § 19.09

Prior Organizations Continued. (a) All existing special assessment districts, service areas, Boards of Supervisors for service areas, community councils and community schools recognized under municipal ordinances, and municipal regulatory and advisory boards and commissions shall continue to function until altered in accordance with this Charter.

(b) Upon ratification of this Charter the former cities shall become service areas for the provision of services formerly provided within their boundaries.

APPENDIX K

Act of February 8, 1887, 24 Stat. 388 CHAP. 119. — An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein pro-

vided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: And provided further, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, *shall make settlement* upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such *settlement* is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appointed, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as

herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation

shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such

citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, not to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.